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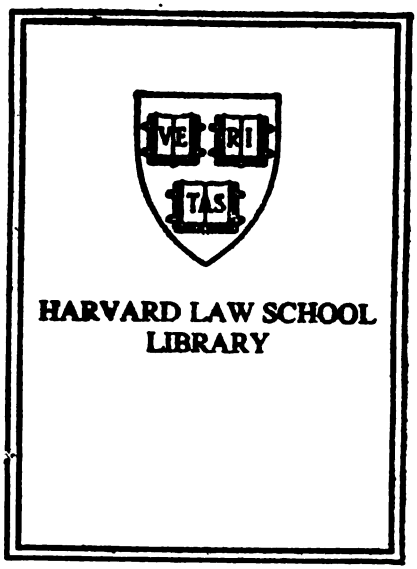

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MINNESOTA REPORTS

VOL. 94

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF MINNESOTA

DECEMBER 23, 1904—MAY 19, 1905

HENRY BURLEIGH WENZELL
REPORTER

LAWYERS' CO-OPERATIVE PUBLISHING CO.
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1906

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Rec. June 26, 1906

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JUSTICES

OF

THE SUPREME COURT

OF MINNESOTA

DURING THE TIME OF THESE REPORTS

Hon. CHARLES M. START, Chief Justice.
Hon. CALVIN L. BROWN.
Hon. JOHN A. LOVELY.
Hon. CHARLES L. LEWIS.
Hon. WALLACE B. DOUGLAS.[2]
Hon. EDWIN A. JAGGARD.[2]

[1]Term of office expired January 4, 1905. [2]Term of office began January 4, 1905.

CARL A. PIDGEON, Esq., Clerk.

ATTORNEYS GENERAL:

Hon. WILLIAM J. DONAHOWER.[3]
Hon. EDWARD T. YOUNG.[4]

[3]Term of office expired January 2, 1905. [4]Term of office began January 2, 1905.

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NOTE

By R. L. 1905, § 85, the reporter is required to report all cases decided in the court.

By R. L. 1905, § 74, the headnote in each case is prepared by the judge writing the opinion.

The cases are reported in the order of their decision, except per curiam cases. The date of the decision follows the title of each case. The numbers given below the date indicate the number of the case in the files of the clerk of court and the number of the case in the general term calendar, the calendar numbers being enclosed in ( ). The cases in this volume preceding the case on page 403, and the cases on pages 519 to 526 (first case), are from the October, 1904, term calendar; the other cases are from the April, 1905, term calendar.

As required by R. L. 1905, § 85, when any Minnesota case has been printed in the periodical known as "The Northwestern Reporter," and is cited in any opinion in this volume, a reference to the book and page of that periodical where such case appears has been inserted in such opinion. A similar citation for each opinion in this volume has been given in a footnote.

In citations from the first twenty volumes of the Minnesota reports the page of the original edition is given, preceded by the corresponding page of the edition prepared by Chief Justice Gilfillan.

CORRECTION

On page 121, infra, footnote 2 should read: "For opinion on reargument, see infra, page 521."

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA.

JAMES B. SWING v. JOHN A. HUMBIRD and Another.[1]

December 23, 1904.

Nos. 14,069—(113).

Mutual Insurance—Assessment by Order of Court.

Action to recover upon an assessment of the policy holders of an insolvent mutual insurance company, made by a court having jurisdiction to wind up its affairs. *Held*:

1. Such assessment is not conclusive upon any policy holder as to the question whether his relation to the company was such as to subject him to liability for an assessment. The judgment making the assessment is, however, conclusive as to matters relating to the necessity for, and the amount of, the assessment.

2. The evidence sustains the findings and decision of the trial court.

Appeal by plaintiff from an order of the district court for Ramsey county, Kelly, J., denying a motion for a new trial. Affirmed.

William W. Fry and *Patterson A. Reece,* for appellant.

Stiles W. Burr, for respondents.

START, C. J.

This is an action by the trustee of the Union Mutual Fire Insurance Company of Cincinnati, Ohio, hereafter referred to as the company, to

[1] Reported in 101 N. W. 938.

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recover from the defendants the sum of $332.06, alleged to be due from the defendants for an assessment upon certain insurance policies issued by the company to them. The answer put in issue the allegations of the complaint as to the assessment, and alleged, in effect, that under their policy contract with the company they were not liable to assessment to pay its losses. The cause was tried by the court without a jury, and findings of fact favorable to the contention of the defendants made, and, as a conclusion of law, judgment directed for the defendants, dismissing the action on its merits. The plaintiff appealed from an order denying his motion for a new trial.

The facts found by the trial court are, so far as here material, substantially these:

The company was incorporated May 27, 1887, under the laws of the state of Ohio, as a mutual fire insurance company. Immediately after such incorporation the company adopted by-laws, a true copy of which is annexed to and made a part of the defendants' answer, which by-laws have never been changed. The company at the time of its organization was authorized by the statutes of the state of Ohio and its by-laws to issue two classes of policies, both mutual in character—one on the premium note plan, and the other on the cash deposit plan, which provided for a "short term participating policy." The first class of policies were to be issued for the full term of five years upon the insured giving a premium or deposit note in such amount as required by the board of directors, and paying one-fifth thereof in cash in advance; that is, the insured paid one-fifth of the premiums for five years in cash, and gave a deposit or premium note for the other four-fifths. All premium notes were subject to assessment for the losses and expenses of the company. The second class of policies were authorized to be issued for a less term than five years. The policy holder in this second class was not permitted to give a note for any part of the premium, but was required to deposit in cash the full premium for the full term for which his policy was issued. The by-laws of the company (article 11, sections 3 and 4) expressly provided that:

> Sec. 3. All policies for less than five years shall be issued upon the receipt by the company, in cash, of the premium for the term insured. Such policies shall be charged with their due

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proportion of all losses and expenses as shall accrue during the time they continue in force. At the expiration of the terms for which such policies are issued, or at their earlier cancellation by the assured, the policy holders shall be entitled to and shall receive a cash dividend of one-half the amount which shall remain unused of the premiums originally paid by them, the remaining half being deposited in the guarantee or reserve fund of the company.

Sec. 4. No member shall be liable for losses or expenses or for any indebtedness of the company in any amount except to the extent of the premium notes given by him.

The statutes of Ohio relating to mutual fire insurance companies were amended by an act approved April 14, 1888, to take effect July 1, 1888 (Laws 1888, p. 273). This amended statute contained, with others not here material, the following provisions:

Nor shall any company on the plan of mutual fire insurance be incorporated until not less than * * * have been subscribed and the premium thereon, for one year, paid in cash * * * each subscriber agreeing, in writing, to assume a liability to be named in the policy subject to call by the board of directors, in a sum not less than three nor more than five annual premiums. And the same liability shall also be agreed to in writing by each subsequent subscriber or applicant for insurance, who is not a merchant or manufacturer. * * * Any such company must in its by-laws, and must in its policies, fix by a uniform rule the contingent mutual liability of its members for the payment of losses and expenses; and such contingent liabilities shall not be less than three nor more than five annual cash premiums as written in the policy.

Every person who effects insurance in a mutual company, and continues to be insured, and his heirs, executors, administrators, and assigns shall thereby become members of the company during the period of insurance, shall be bound to pay for losses and such necessary expenses as accrue in and to the company in proportion to the original amount of his deposit note or contingent liability.

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> This act shall not affect companies now doing business on the premium note plan unless they elect to dispense with said notes and embody the contingent liability in the policy as herein provided; and said original sections * * * are hereby repealed. Provided that said sections shall remain in force as to all mutual companies now doing business which do not elect to reorganize under the said sections as amended by this act.

The company never reorganized, or attempted so to do, under the statute as amended. But after it was so amended, and in September, 1889, the company issued to the defendants two policies of insurance, whereby it insured them against loss by fire of lumber owned by them for one year from October 1, 1889, in the sum of $1,500 and $5,000 respectively. Each of the policies was of the class known as "short term participating policies," as provided by the by-laws of the company. The defendants paid to and deposited with the company $100 for the larger policy, and $30 for the lesser one, in accordance with the by-laws and regulations of the company as recited in the policies. The amount so paid and deposited for each policy was the full amount of premium for one year at the maximum rate demandable or receivable by the company for a policy of insurance of that amount on property of the character and situation of that insured by each policy. The defendants did not give any premium or deposit note, or agree in writing to assume any liability, nor were they required so to do. No reference was made in the policies to any liability, contingent or otherwise, on the property of the defendants, in addition to the cash deposit. On December 1, 1889, the property described in the policies was destroyed by fire, and in March, 1890, the company paid to the defendants the sum of $6,500 in full settlement and satisfaction of its liability under the policies, which were surrendered to the company and canceled by it. The company became insolvent, and on December 18, 1890, it was, in proceedings in the supreme court of the state of Ohio, so adjudged, and dissolved, and the plaintiff appointed the trustee for its creditors and policy holders. He is now acting as such trustee. Some eleven years thereafter, and on June 11, 1901, the supreme court of Ohio made and entered its ex parte (as to the defendants) judgment or decree of assessment, as alleged in the complaint herein.

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The plaintiff's assignments of error present two general questions for our consideration:

First. Is the judgment making the assessment conclusive upon the defendants as to their liability to assessment for the losses of the company?

Second. Are the findings and decision of the trial court sustained by the evidence?

1. The plaintiff contends, in effect, that the ex parte decree in question is conclusive upon the defendants upon the question of their liability to assessment for the losses of the company, and that they are barred from urging the defense pleaded in this case. The question of the conclusiveness of an assessment upon stockholders and members of a corporation for the payment of its liabilities made by a court having jurisdiction to wind up its affairs is too well settled in this state to justify any extended discussion of it. Where a court has such jurisdiction of a corporation, its order or decree making an assessment upon its stockholders or members without personal notice to them is conclusive as to all matters relating to the necessity for making the assessment, and the amount thereof. But it does not conclude any stockholder or member as to the question whether his relation to the corporation was such as to subject him to liability for an assessment, or as to any other defense personal to himself. Langworthy v. Garding, 74 Minn. 325, 77 N. W. 207; Langworthy v. C. C. Washburn Flouring Mills Co., 77 Minn. 256, 79 N. W. 974; Straw & Ellsworth Mnfg. Co. v. L. D. Kilbourne Boot & Shoe Co., 80 Minn. 125, 83 N. W. 36; Dwinnell v. Kramer, 87 Minn. 392, 92 N. W. 227. The assessment in the case last cited was made by one of the courts of our own state, yet effect was given to the claim of the defendant that by virtue of his policy contract he was not liable to assessment.

Now, the defense made by the defendants in this case is not, as plaintiff seems to assume, that the company had not observed the provisions of the statute governing it, and therefore the defendants were not members of the company. But the defense is that by the terms of their contract with the company they were not liable for any assessment, or, in other words, that their policies were of the class which imposed no liability upon the holders thereof beyond the amount of the cash deposit required.

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It is clear that this contention is correct if the company did not, before the defendants' policies were issued, reorganize under the provisions of the amended statute. It may be conceded that the original statute did not in direct terms authorize the two classes of policies provided for in the by-laws of the company. The by-laws, however, are not inconsistent with the statute, for in the case of policies of the second class a deposit in cash for the entire premium for the full term was made, instead of a premium note for four-fifths of the premium. In accordance with section 3 of the by-laws we have quoted, the due proportion of such policies for all losses and expenses of the company during the time they are in force is to be charged against this cash deposit, and, if there is a surplus of the deposit left, policy holders are to receive back one-half thereof as a dividend. This by-law does not impose any liability on such policy holders beyond the amount of the cash deposit. It was obviously intended to provide for a participation in the profits, if any there should be, by the policy holders of the second class, who deposited cash in lieu of premium notes. It would be manifestly unjust to assess or impose a contingent liability on such policy holders, when those who gave a premium note were not liable, except to the amount of the note; hence section 4 of the by-laws was adopted, which provides that no member shall be liable in any amount, except to the extent of the premium note given by him.

The defendants made the cash deposit but gave no premium note, as none was or could be required. It follows, upon the hypothesis stated, that they are not liable to assessment for the losses, for they paid and deposited in advance their full contribution therefor. In re Minneapolis Mut. Fire Ins. Co., 49 Minn. 291, 51 N. W. 921; Swing v. H. C. Akeley Lumber Co., 62 Minn. 169, 64 N. W. 97; Given v. Rettew, 162 Pa. St. 638, 29 Atl. 703. It also follows that their defense is not foreclosed by the judgment making the assessment. Great Western Telegraph Co. v. Purdy, 162 U. S. 329, 16 Sup. Ct. 810.

2. This brings us to the question whether the findings and decision of the trial court are sustained by the evidence. The most material finding of fact which is challenged is to the effect that the company never reorganized under the amended statute. The plaintiff claims that it conclusively appears, from the evidence that the by-laws were

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adopted after the amended statute went into effect, and on July 31, 1888, and further that this fact makes it plain that the company did reorganize before the policies were issued in this case. The reply substantially admits the allegations of the answer that the by-laws were adopted immediately after the incorporation of the company, and have never been changed.

But if it be conceded that the by-laws were adopted at the time claimed by the plaintiff, the fact is immaterial in this case, for such fact has no tendency to show any reorganization of the company. On the other hand, the by-laws show upon their face that they were not adopted with reference to a reorganization of the company, for they are radically inconsistent with the requirements of the amended statute. The statute as amended requires that each applicant for insurance, other than a merchant or manufacturer, should agree in writing to assume a liability to be named in the policy, in a sum not less than three nor more than five annual premiums, and, further, that the company must, in its by-laws and policies, fix by a uniform rule the contingent mutual liability of its members at not less than three nor more than five annual cash premiums, as written in the policy. Neither the by-laws nor the policies in this case comply with any of these provisions. The by-laws are only consistent with the purpose of the company not to reorganize under the amended statute, and, in connection with the policies issued after they were adopted, they tend strongly to show that there was no reorganization of the company. The evidence is sufficient to sustain the finding.

This makes it unnecessary to decide whether the defendants would, in view of the terms of their policies, have been liable to assessment in case the company had in fact reorganized. See Dwinnell v. Kramer, 87 Minn. 392, 92 N. W. 227.

We have considered the other assignments of error, and have reached the conclusion that all the findings of the trial court which are essential to its decision are sustained by the evidence. The defendants are not estopped to assert their defense in this case by the fact that they met with a loss, and were paid the full face of their policies by the company. In making such payment the company simply discharged its contract obligations.

Order affirmed.

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THOMAS P. HANNA and Another v. FRANK R. DUXBURY and Others.[1]

December 23, 1904.

Nos. 14,073—(177).

Conspiracy to Defraud—Pleading.

The complaint alleges that defendant D. entered into a contract to sell certain real estate for plaintiffs, and to account to them for eight dollars per acre, all received over that amount to be retained by the agent as commission; that the agent entered into such contract with the design and purpose, in connection with other defendants, of cheating and defrauding plaintiffs, and, in pursuance of such purpose, sold to certain other of the defendants certain parcels of land embraced within the contract for sums in excess of eight dollars per acre; that in each case such purchaser paid to the agent a sum less than eight dollars per acre, and executed a mortgage for the remainder, with knowledge of the fact that the agent was to account to plaintiffs for the amount of eight dollars per acre, and with knowledge of such fraudulent purpose of defendant D.

It appearing that each purchaser had no knowledge of nor any connection with the original conspiracy or contract, and it appearing that the purchase of each particular tract by such defendants, respectively, constituted an independent and separate transaction, conceding that such defendants might under such circumstances be required to account to plaintiffs for the land purchased by them respectively, and conceding that the complaint states a cause of action against each one of them, *held*, such causes are improperly joined.

Appeals by plaintiffs from orders of the district court for Pine county, Crosby, J., sustaining separate demurrers to the complaint interposed by defendant Frank R. Duxbury and defendants Francis A. Duxbury and others. Orders affirmed.

B. H. Schriber and *A. E. Horn,* for appellants.

Duxbury & Duxbury, for respondents.

LEWIS, J.

Appeal from orders sustaining separate demurrers to the complaint, upon the ground that several causes of action were improperly united.

The following facts are set forth as the basis of the action: Francis

[1] Reported in 101 N. W. 971.

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A. and William R. Duxbury, during all of the times mentioned, were copartners in business under the firm name of Duxbury & Duxbury, duly licensed attorneys at law, and brothers of defendant Frank R. Duxbury. Prior to January 1, 1902, plaintiffs had entered into a contract with the owners of certain real estate located in Pine county for the purchase thereof, and on or about January 1, 1903, plaintiffs appointed Frank R. Duxbury their agent to sell the land, and agreed to pay him all he might get over eight dollars an acre as a commission for his services. Upon the recommendation of Frank R. Duxbury, plaintiffs authorized the firm of Duxbury & Duxbury to perform the necessary legal services in consummating any sales of such lands. The three defendants Duxbury thereupon conspired to defraud plaintiffs out of their title and interest to the land and the proceeds thereof in the manner set out in detail, and then follows a statement of nine transactions, designated subdivisions A to I.

A. January 2, 1903, Frank R. Duxbury, acting as agent for plaintiffs under the aforesaid contract of employment, negotiated a sale to defendants McCracken and Seeley of the southwest ¼, section 17, township 41, range 17, Pine county; that plaintiffs procured and delivered to Frank R. Duxbury a proper deed to the premises, conveying the same to McCracken and Seeley for the consideration of $1,600; that Frank R. Duxbury wrongfully, unlawfully, and for the purpose of cheating and defrauding plaintiffs, delivered the deed to McCracken and Seeley without receiving any consideration other than the sum of $760, and unlawfully and without authority, and for the purpose of defrauding plaintiffs, induced McCracken and Seeley and their wives to execute a mortgage on the premises to defendant John Richards for $840, which was without consideration and void. "That all the facts aforesaid mentioned in this subdivision A were then and there well known to said defendants William A. Seeley, Mary L. Seeley, William P. McCracken, Henrietta McCracken, and John Richards."

It is further stated that the mortgage was filed in the office of the register of deeds in Pine county, and that, of the $760 received by Frank R. Duxbury, only $543 was paid for the benefit of plaintiffs, and that the three Duxburys converted the remainder to their own use, on account of which unlawful acts plaintiffs were defrauded out of $1,006.15.

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Subdivisions B, C, and D of paragraph 4 set out three separate transactions, constituting sales of different parcels of land to defendant Daniels, who in one case paid the entire consideration to Frank R. Duxbury, and in the other cases paid only a part of the consideration and executed mortgages for the remainder, the Duxburys having failed to pay over or account for the same.

A similar sale is stated in subdivision E to defendant Grayling, and in F, to defendant Dumdie. Subdivision G sets out a like deal with one Henry J. Tammel, who was not made a party defendant, and H recites a similar transaction with defendant E. A. Barr.

Under I the transaction takes a little different form. In this instance Frank R. Duxbury negotiated a sale of eighty acres to defendants E. A. and Arthur Moore for $1,200, and received the proper deed from plaintiffs, which he delivered to the purchasers; but, instead of receiving a cash consideration, a deed was delivered to certain real estate in Iowa, and a bill of sale of certain personal property in Iowa, the conveyances running to defendant Frank R. Duxbury. It is alleged that all of this was known to defendants Moore, and that, out of plaintiffs' moneys already in the hands of defendant Frank R. Duxbury, he paid out for plaintiffs' benefit $271.94 on account of this purchase.

In paragraph 6 it is stated that plaintiffs advanced to defendant Frank R. Duxbury $401.85 for the purpose of aiding and negotiating the sales aforesaid, and that defendants Duxbury have converted to their own use $285 of the amount, and, for the purpose of enabling defendant William R. Duxbury to aid in his employment, plaintiff Hanna assigned to him a certain mortgage on real estate in Spring Valley, Minnesota, amounting to $250, which he unlawfully caused to be assigned and converted to the use of defendants Duxbury.

Paragraph 7 states that February 18, 1903, in furtherance of the conspiracy to defraud plaintiffs, defendant Frank R. Duxbury induced plaintiffs to deliver to him a contract for 1,283.38 acres of the land above mentioned, located in Pine county, which contract was taken by Frank R. Duxbury for the benefit of the three Duxburys; that the consideration named in the contract was $7.50 per acre; that plaintiffs executed and delivered the proper deed conveying to Frank R. Duxbury 483.38 acres of land for the stated consideration of $3,625.35, the

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deed was recorded by defendant, and the land conveyed by Frank R. Duxbury to his brothers, who thereafter executed a mortgage on the premises for $1,600; all of which deeds were duly recorded. That thereafter, January 19, 1904, such mortgage was satisfied by the use of money belonging to plaintiffs, received from the sales of lands set out in subdivisions A to I of the complaint. Other transactions in respect to the remainder of the land covered by the contract of purchase are also set forth.

Paragraph 8 contains another transaction, to the effect that defendant Frank R. Duxbury, as agent of the plaintiffs, negotiated a sale of one hundred twenty acres of land in Pine county, and upon an examination of the abstract discovered there was an outstanding title adverse to plaintiffs, and, acting upon such knowledge, defendants Duxbury secured a quitclaim deed of such adverse interest running to defendant Frank R. Duxbury, and then instituted suit to quiet title as against plaintiffs' grantors, with the intent of cheating and defrauding these plaintiffs; and that defendants Duxbury procured titles of adverse interests respecting other lands belonging to plaintiffs, having obtained knowledge thereof in the course of their employment as plaintiffs' agents and attorneys, and that they hold title to such adverse interests in pursuance of the general conspiracy to defraud plaintiffs out of the lands.

The prayer for relief demands a money judgment against defendants Duxbury for the various amounts alleged to have been converted, annulling and canceling the deeds mentioned in paragraph 7, and decreeing that plaintiffs are the owners of the lands therein described, but if the court should find that defendants Duxbury have any title or interest in any tracts of land mentioned in paragraph 7, that their interest be decreed subordinate to that of plaintiffs; that the mortgage executed by defendants McCracken and Seeley, set out in subdivision A, be canceled, and that plaintiffs be decreed to have a lien for $840 upon the premises conveyed to McCracken and Seeley; that defendants Duxbury be directed by the judgment of the court to deliver to plaintiffs the mortgage described in subdivision C of paragraph 4; that the mortgage executed by defendant Daniels be annulled and set aside, and that plaintiffs be decreed to have a lien upon the premises conveyed to Daniels superior to the interests of the defendants; a similar prayer

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with reference to defendants Grayling, Dumdie, and Barr; that the deed of conveyance from plaintiffs to defendants Moore be canceled, and that plaintiffs be decreed to be the owners of the land conveyed to them, unless the court should find that defendants Moore are the owners, in which case plaintiffs be adjudged to have a superior lien upon the premises for $928.

The complaint was demurred to separately by defendants Francis A. and William R. Duxbury, and defendant Frank R. Duxbury, upon the ground that several causes of action are improperly united, and that the complaint does not state facts sufficient to constitute a cause of action. Both demurrers were sustained by the trial court, upon the ground that several causes of action were improperly united.

It was no doubt the theory of the pleader that the allegations of fraud and conspiracy alleged to have been designed by defendants Duxbury with respect to the lands under contract in Pine county permeated and entered into every subsequent transaction with the different defendants to such an extent that they may be called to account in connection with the Duxburys. Conceding that as to defendants Duxbury a cause of action is stated which arose out of their failure to carry out the terms of their contract, does it follow that each purchase by the several defendants is a part of and embraced within the same cause of action?

Taking up subdivision A. The pleader sets out in detail a sale and purchase to McCracken and Seeley of one hundred sixty acres of land by plaintiffs, acting through their agent, Frank R. Duxbury. The purchasers agreed to pay for this land two dollars an acre more than the agent was to account for to plaintiffs; that instead of paying the agent the full amount of eight dollars an acre cash, amounting to $1,280, the purchasers gave the agent only $760, and executed a mortgage, running to defendant John Richards, for $840, to secure the remainder. The only allegation to connect defendants McCracken and Seeley with the original transaction between plaintiffs and the Duxburys is this:

> That all the facts aforesaid mentioned in this subdivision A were then and there well known to said defendants William A. Seeley, Mary L. Seeley, William P. McCracken, Henrietta McCracken, and John Richards.

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These purchasers knew that Frank R. Duxbury was plaintiffs' agent, with authority to sell the land and account to them for the sum of eight dollars per acre. They knew they were agreeing to purchase the land at an advance of two dollars per acre, which amount constituted the agent's commission, and that the agent had a purpose to defraud his principals by receiving a less sum in cash than eight dollars per acre, and in taking a mortgage for the remainder, running to a third party, John Richards. Admitting that the allegations are sufficient to charge Seeley and McCracken with knowledge of the fraudulent purpose of Frank R. Duxbury in taking a mortgage instead of the cash, it is not charged that they received any benefit therefrom, and such knowledge was limited to the particular transaction under consideration, viz., the purchase of the one hundred sixty acres by them.

The same may be said with reference to the facts set forth in subdivisions C, D, E, F, H, and I, of paragraph 4. No doubt, if the purchasers of the several tracts, McCracken, Seeley, and others, had knowledge of the alleged design and purpose of the Duxburys to obtain title to plaintiffs' land without accounting for the proceeds according to the terms of their contract, and for the purpose of carrying out such scheme they subsequently became purchasers of parcels of land and paid the purchase price and executed the mortgages to the Duxburys and other parties in furtherance of such scheme, then they could be brought in as parties defendant and compelled to account for their part in the illegal transactions. The pleader, no doubt, proceeded upon this theory, as the citation of authorities would indicate. For instance, in Jones v. Morrison, 31 Minn. 140, 16 N. W. 854, from the opinion in which case counsel quotes the following language: "Where a complaint alleges a conspiracy to cheat and defraud plaintiff in respect to his interests as a stockholder in a corporation, all separate acts or transactions of defendants done pursuant to it may be joined in the complaint, although some of them do not affect all the defendants, and none of them affect any two of the defendants to the same extent or degree." But an examination of the complaint in that case shows that all of the parties were connected with the transaction from the beginning, and that the several acts charged as a part of the conspiracy were not separate and independent transactions, but were merely the various acts committed in connection with the main cause set forth.

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This is not a case within the rule cited in Foster v. Landon, 71 Minn. 494, 74 N. W. 281, viz., that a cause against one defendant may be so entire as to be incapable of being prosecuted in several suits, and yet some other defendant may be a necessary party to some portion only of the case stated, in which case the objection of multifariousness would not obtain. That rule applies only where there is but one cause of action, and where the subsequent acts connecting defendants arise out of the same transaction, forming one course of dealing, all tending to one end. 2 Pomeroy, Rem. & Rem. Rights, § 486. Neither is this case within the rule that all the fraudulent grantees may be united as defendants in an action brought to set aside fraudulent conveyances, where each grantee is charged only with fraud in his own purchase. That rule applies in respect to creditors' bills. Hamlin v. Wright, 23 Wis. 491. The state of facts necessary to the application of such a rule is entirely absent.

The facts pleaded with respect to the sales mentioned under subdivisions A, C, D, E, F, H, and I, paragraph 4, constituted separate and independent transactions as to each other. Each of these separate transactions is in no way connected with the subject of the action involved in each of the other transactions and with the main cause of action pleaded against defendants Duxbury. Such being the case, it may be added that they are improperly joined, for the reason that these several independent causes of action do not affect all the parties to the suit. Section 5260, G. S. 1894, subd. 7, provides that the causes of action so united shall belong to only one of the classes, and affect all the parties to the action. Trowbridge v. Forepaugh, 14 Minn. 100 (133); Berg v. Stanhope, 43 Minn. 176, 45 N. W. 15; and Langevin v. City of St. Paul, 49 Minn. 189, 51 N. W. 817.

Orders affirmed.

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JAMES BLOOMER v. HANNAH BURKE and Others.[1]

December 23, 1904.

Nos. 14,090—(141).

Foreclosure of Mortgage—Sale of Copy of Mortgage Note.

B. and wife executed a mortgage upon their homestead to E. to secure payment of a promissory note for $3,700, due five years from date, interest payable annually at the office of E. according to the terms of coupon notes attached, and contemporaneously therewith executed and delivered to E. a deed conveying the premises, the consideration of which was expressed by oral agreement that E. would protect title to the premises and furnish grantors a home thereon, and support them during their lives. After the mortgage and before the deed was recorded, E. presented a copy of the original note to respondent, representing it to be the original, and in consideration of $3,700 sold, assigned, and transferred to him the note and mortgage, assignment of the latter being executed upon the back of the note. Subsequently to the recording of the deed E. conveyed the premises, and as a part of the purchase price received a mortgage thereon for $5,000, which was assigned to appellant.

This action having been brought by appellant to foreclose the mortgage, *held*:

1. The evidence justified a finding of the trial court that it was not the intention of B. and wife, in conveying the premises by deed to E., to thereby pay off the mortgage executed contemporaneously therewith.

2. The evidence was sufficient to sustain a finding that E., for a valuable consideration, transferred, sold, and assigned all his right, title, and interest in the original note and the mortgage to respondent.

3. The fact that at the trial of the action it appeared that respondent was deceived by the representations of E., and accepted a copy of the note for the original, and that the original was unaccounted for, did not render respondent's lien subservient to the subsequent lien acquired by appellant.

Appeal by defendant George Meyer from an order of the district court for Ramsey county, Brill, J., denying a motion for a new trial, after a trial and findings in favor of plaintiff. Affirmed.

John F. Fitzpatrick, for appellant.

William G. White, for respondent.

[1] Reported in 101 N. W. 974.

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LEWIS, J.

Action to foreclose a mortgage alleged to have been executed by Hannah Burke and David Burke, her husband, upon certain property in St. Paul, executed to secure a promissory note of $3,700, the note and mortgage having been executed in the first instance to Casper Ernst and assigned to plaintiff.

Defendant George Meyer is the only defendant who appeared and answered, and he admits the execution of the note and mortgage; alleges that March 16, 1898, the Burkes executed and delivered to Ernst their warranty deed by which they conveyed the premises covered by the mortgage to Ernst in full satisfaction of the mortgage; that Ernst occupied the premises with his wife as their homestead, and July 16, 1903, conveyed the premises to defendant Julia E. Bowen by proper warranty deed, and to secure a part of the purchase price the Bowens executed and delivered to Ernst a mortgage for $5,000, dated August 20, 1903, which was duly recorded, and subsequently thereto sold and assigned, for full value, to defendant Meyer. The answer contains a general denial, and alleges that defendant never had any notice of plaintiff's claim or interest in the estate.

The trial court found that the note and mortgage were executed by the Burkes to Ernst March 14, 1898, the note being for $3,700, at the rate of seven per cent. interest, payable at the office of C. Ernst & Co., St. Paul; that the mortgage was acknowledged March 18, 1898, and recorded March 19, 1898, in the proper registry office; that there was a prior mortgage upon the premises of about $3,700, and that the mortgage and note were executed and delivered by the Burkes to Ernst, their son-in-law, pursuant to an oral agreement that he would pay off the prior mortgage, which was the only consideration therefor. The court also found that, contemporaneously with the execution and delivery of the mortgage and note, the Burkes executed and delivered to Ernst a warranty deed, of date March 16, 1898, the consideration named therein being $12,500, which was acknowledged March 18, 1898, and recorded in the proper registry December 4, 1901. The actual consideration, however, was an oral agreement that Ernst would protect the title to the premises, and furnish the Burkes a home thereon and support them during their lives. The court further found that it was not the intention of the parties that the deed and mortgage should

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merge; that in August, 1900, Ernst represented to plaintiff that he was the owner and holder of the note and mortgage, that the same were in full force and effect, and that the mortgage was a valid lien upon the premises, and that plaintiff, so believing, and having no notice of the subsequent deed, purchased the note and mortgage, and paid therefor the sum of $3,700, whereupon Ernst delivered to plaintiff the original mortgage without any written assignment thereof, save as hereinafter stated, and delivered to him a copy of the note, which upon its face appeared to be the original, and which he then and ever afterwards believed to be the original, as represented; and upon the back of the copy of the note was the following assignment:

> For value received, I hereby assign and transfer the within note, together with all my interest in all my rights under the mortgage securing the same to James Bloomer with recourse.
> Aug. 20, 1900.

—which assignment was then and there signed by Ernst. The court found that the interest was paid to March, 1903, and that it does not appear what became of the original note. It was also found that Ernst was in possession of the premises as his homestead from the time of the execution of the deed, and that during all of the time mentioned the Burkes have resided there. The court found that Meyer did not at any time have any actual notice or knowledge of any right or claim by plaintiff in, upon, or to the premises, or that the note or mortgage executed by the Burkes to Ernst had ever been transferred or disposed of in any manner to any one. As a conclusion of law the court held there was no merger of the mortgage and deed; that the title to the note and mortgage passed to plaintiff; that the title of defendants Bowen and the lien of the mortgage of defendant Meyer are subject to the lien of plaintiff, who was entitled to have his mortgage foreclosed and the premises sold to pay the same.

There were two distinct issues presented by the answer: First, that the deed executed by Mr. and Mrs. Burke to Ernst operated as a payment of the mortgage and was a full satisfaction thereof; second, denial of the sale and transfer of the note and mortgage to plaintiff. The assignments of error will only be considered with reference to these two issues.

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1. The finding of the court that the deed and mortgage were executed contemporaneously and that it was the intention of the parties that they should not merge is supported by the evidence. While there is some ground for the claim that in executing and delivering to their son-in-law a deed of their homestead it was the intention of Mr. and Mrs. Burke to provide for themselves a future home, and for their support by him, and as a part of the consideration for such support and the conveyance of the property the mortgage be considered paid and canceled, on the other hand there was a prior incumbrance upon the premises, and they may have intrusted their son-in-law with the new mortgage for the express purpose of negotiating the same in order to raise the funds to pay off the former one. Ernst's actions were consistent with this theory. He retained the mortgage in his possession, caused it to be recorded, and did not record the deed until more than three years subsequent, and in assigning the mortgage and note to plaintiff it is reasonable to assume that in executing both instruments at the same time the Burkes intended to give force and effect to both, nothing to the contrary appearing upon their face.

2. The court found that Ernst sold the note and mortgage to plaintiff in consideration of $3,700, and that the title to the same passed to plaintiff. While the original note was unaccounted for, and a copy of it was presented to plaintiff, and represented to him as being the original, and the written assignment was upon the back of the copy, this would not affect the validity of the transaction, and the title to the note and mortgage passed. The finding of the court in this respect is not attacked, and the only question requiring consideration is, how are the respective rights of defendant Meyer and plaintiff affected by the fact that the original note was not delivered to plaintiff by Ernst, and the possibility that it may hereafter turn up in the hands of some innocent purchaser?

It is true that the transfer of a negotiable promissory note secured by a mortgage carries the security as an incident. First Nat. Bank of Mankato v. Pope, 85 Minn. 433, 89 N. W. 318. But does it follow that the burden of proof was upon plaintiff to account for the outstanding original note, and, when it appeared during the course of the trial that such note was not accounted for, there was a complete failure of proof of title in plaintiff? The court found specifically that the

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note and mortgage were executed and delivered to Ernst; that plaintiff agreed to purchase the same, and that pursuant to such agreement, August 22, 1900, plaintiff paid Ernst the sum of $3,700 for the note and mortgage, and that Ernst sold the same to plaintiff. Since there was an original note executed, running with the mortgage, it is immaterial whether Ernst represented a copy to be the original, and whether plaintiff accepted such copy as the original. The note was sold by Ernst and acquired by plaintiff, and the mortgage was assigned to him. If he, by purchase, acquired the original note, but through some mistake or fraud of Ernst did not get possession of it, he nevertheless acquired title.

Assuming, however, that as against a bona fide holder of the note defendant Meyer took the chances as to its validity, does it follow that as between plaintiff and defendant the latter has acquired prior equities, so that in this proceeding he is in a position to prevent plaintiff from enforcing his lien? The mortgage in question was put upon record, and at the time defendant, some three years later, took an assignment of his subsequent lien, an examination of the record would have disclosed the fact that the note was secured by mortgage due in five years, with interest, payable annually according to coupon notes at the office of C. Ernst & Co., St. Paul, Minnesota. There was no satisfaction of this mortgage. So far as the record disclosed, it was still valid, and the note outstanding. Under such circumstances he was called upon to pursue the inquiry and find out where the note was. If he had done so, and had been informed by Ernst that it had been assigned and transferred to plaintiff, then he would have received notice of plaintiff's claim; but even if he had ascertained the facts as they now appear, and had learned that a copy of the note represented as the original had been assigned to plaintiff, and that the original was unaccounted for, he would thereby have been charged with knowledge of plaintiff's rights, whatever they were. So far as this record shows, the equities of defendant Meyer are secondary in point of time to those of plaintiff, and he is in no position to urge the possibility of a new lien claimant appearing.

Order affirmed.

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FRANK A. SEYMOUR and Another v. DENNIS RYAN and Others.[1]

December 23, 1904.

Nos. 14,091—(145).

Bill of Sale.

A certain instrument construed, and *held* to constitute a bill of sale or assignment, and not a mortgage, of the surplus rents and profits accumulating in the hands of a trustee.

Conduct of Parties.

The conduct of the parties with respect to the purpose of the instrument did not conclusively show that it was intended as a mortgage for the security of the debt.

Evidence.

The findings of the court are sustained by the evidence.

Plaintiffs having recovered a judgment against defendant Ryan the same was assigned to Urban Investment Company, which thereafter instituted garnishment proceedings in the district court for Ramsey county against Minnesota Loan & Trust Company. Whereupon Thomas F. Keeley intervened, claiming under an assignment from Ryan to be entitled to the fund in possession of the garnishee. The issues between the Urban Investment Company and the intervening claimant were tried before Olin B. Lewis, J., who found in favor of claimant. From an order denying a motion for a new trial, Urban Investment Company appealed. Affirmed.

J. F. Fitzpatrick, for appellant.

C. D. & Thos. D. O'Brien, for respondent.

LEWIS, J.

Garnishee proceedings by appellant, a judgment creditor of Dennis Ryan, to recover a sum of money claimed to belong to Ryan, in the hands of the Minnesota Loan & Trust Company, garnishee.

This appeal involves the construction of the following instrument:

> This indenture made this twenty second day of December A. D. 1900, witnesseth: That Dennis Ryan of the city of St.

[1] Reported in 101 N. W. 958.

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> Paul, Ramsey county, state of Minnesota, party of the first part, for and in consideration of the party of the second part having loaned to him the sum of $25,000, for which he now acknowledges himself to be indebted, and for other good and valuable consideration to said party of the first part in hand paid, the receipt whereof is hereby acknowledged, has sold, assigned and set over * * * to Thomas F. Keeley of the city of Chicago, county of Cook and state of Illinois, party of the second part, all and singular the rents, issues and profits which may arise out of or be procured from certain property known as the Hotel Ryan, located * * * in the city of St. Paul, county of Ramsey and state of Minnesota. Subject, however, to any and all rights and interests now held or owned by the Minnesota Loan & Trust Company under and by virtue of a certain mortgage heretofore given to that company upon said property.

The instrument also contains a recital to the effect that the rents should be collected by the first party free of cost to the second party, and turned over to him to be applied upon the indebtedness, and that, if the second party should feel himself insecure at any time, he might, through himself or agents, enter upon the premises, take possession, and collect the rents, issues, and profits, and, if he deemed it advisable, he might expend such parts of the rents and issues for taxes, and interest upon the mortgage, premiums for insurance, and alterations and repairs, as, in his judgment, he deemed proper. The agreement also authorized the employment of attorneys to prosecute actions for the recovery of rents, and closed with the following clause:

> This agreement shall continue in full force and effect until such time as said party of the second part shall have been paid said sum of $25,000, with interest thereon, and also all outlays and expenses which may have been made or incurred under this agreement.

The trial court found that Ryan was the owner of the premises, and that the same was mortgaged under a trust deed, of date December 1, 1889, to the Minnesota Loan & Trust Company, as trustee; that the trustee was in possession of the property under the mortgage, and a power of attorney thereunder executed, which authorized the trust

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company to rent the premises, and collect and receive all rents, to pay taxes, assessments, insurance, and interest, and to make repairs, and, after the payment of such charges, to turn the surplus, if any, over to the owner, Ryan.

The court further found that December 22, 1900, Ryan in good faith, for an actual consideration of $25,000, sold, assigned, and set over to respondent, Keeley, all and singular, the rents, issues, and profits arising from, or which should thereafter arise from, the property, subject only to the rights and interests of the Minnesota Loan & Trust Company under its mortgage, until respondent should receive or be paid the sum of $25,000; that there was still due on account of such indebtedness a sum greater than $12,000; that December 23, 1903, there was in possession of the Minnesota Loan & Trust Company, as trustee, a surplus balance of $5,295.55, which had accumulated subsequent to December 1, 1902, which sum was then due and payable to Ryan absolutely, over and above all claims, by the Minnesota Loan & Trust Company. As a conclusion of law, it was found that respondent was entitled to recover such amount, and that appellant had no interest therein.

The rents and profits to accrue were subject to sale. This is admitted, but it is asserted that upon its face the instrument purports to be a conveyance for the security of money; that it is a real estate or chattel mortgage, and hence should have been placed upon record. But if not a mortgage in form, it was so treated, and appellant, having no notice thereof, was entitled to precedence; conceding that the instrument was sufficient to convey title to the funds as between the parties. The instrument is a straight assignment to Keeley of whatever surplus might accumulate in the hands of the trustee. The character of the instrument is in no way changed by the fact that it embodies an agreement authorizing the grantee to collect the rents himself, if he saw fit, or that the rents should be collected free of cost to the party of the second part, who, if he so desired, might expend the receipts to take care of the prior incumbrance, or for the betterment of the premises. Those provisions are not inconsistent with the direct and positive terms of the conveyance. Title passed absolutely, and there was nothing upon the face of the instrument to indicate any intention to retain title in the grantor. The conduct of the parties does not necessarily lead

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to the conclusion that the instrument was intended to operate as a mortgage. The facts that it was given to meet an indebtedness which had existed for some time, that Keeley held other security for the same indebtedness, and that the debt had been reduced to about $12,000 by realizing upon some of the collateral, do not necessarily indicate an intention of the parties to treat the transfer as security. There is no inconsistency in the fact that the amount of the rents and profits to be applied was not specifically stated, it being definitely limited to $25,000 of the accumulating surplus. The evidence was sufficient to sustain the findings.

Order affirmed.

KATHERINE ALICE BRIGGS v. M. S. RUTHERFORD.[1]

December 23, 1904.

Nos. 14,131—(153).

Pleading.

Following Root v. Childs, 68 Minn. 142, where the obligation of a party to a contract is to pay only upon the happening of a contingency, its occurrence must be alleged in the complaint in an action for the recovery of the money.

Amendment after Judgment.

Where it clearly appears the defendant was not misled or in any way prejudiced in maintaining his defense upon the merits, an amendment of the complaint to conform to the facts proved should be allowed even after judgment. Adams v. Castle, 64 Minn. 505; G. S. 1894, § 5262.

New Trial.

Where the verdict is clearly sustained by the evidence, and it not appearing affirmatively that the trial court granted a new trial in the exercise of its discretion, following Fitger v. Guthrie, 89 Minn. 330, such an order will be reversed.

Appeal by plaintiff from an order of the district court for Mille Lacs county, Searle, J., granting a motion for a new trial, after a trial

[1] Reported in 101 N. W. 954.

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and verdict in favor of plaintiff for $56.51. Reversed and remanded with instructions.

Edson S. Gaylord and *Frank T. White*, for appellant.

E. L. McMillan, for respondent.

DOUGLAS, J.

This action was brought to recover the amount advanced upon an option contract for the purchase of real estate. The issues of fact were submitted under clear and explicit instructions, and determined by the jury in its verdict in favor of the plaintiff. The trial court granted a new trial upon the ground that a material variance existed between the pleadings and the proof, and also suggested generally that other questions were argued, and that such motion was granted upon an inspection of the whole record.

The complaint was for money had and received, which it was alleged "defendant promised and agreed to repay plaintiff on demand." It appears from the evidence defendant agreed to repay the plaintiff the amount advanced in case of default on his part in making the conveyance referred to. Following Root v. Childs, 68 Minn. 142, 70 N. W. 1087, in which it was held that, where the obligation of a party to a contract is to pay only upon the happening of a contingency, this occurrence must be alleged in the complaint in an action for the recovery of the money, we are of the opinion the pleading at bar was insufficient. The court, however, admitted evidence thereunder, and at the close of plaintiff's case, defendant, expressly waiving the question as to the admissibility of evidence, moved the court for a directed verdict. The motion was overruled, and again renewed after defendant had offered evidence in his behalf under the issues as they were then interpreted by the trial court. It clearly appears defendant was not misled or in any way prejudiced in maintaining his defense on the merits, and we are of the opinion, as was held in Adams v. Castle, 64 Minn. 505, 67 N. W. 637, that it was the duty of the trial court to allow an amendment of the complaint, even after judgment, so as to conform to the facts proved. G. S. 1894, § 5262.

It not appearing affirmatively that the trial court granted a new trial in the exercise of its discretion (Fitger v. Guthrie, 89 Minn. 330, 94 N. W. 888), and, inasmuch as it clearly and conclusively appears

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the verdict was sustained by the evidence, the order granting a new trial is reversed, and cause remanded, with directions to permit the plaintiff to amend her complaint so as to conform to the facts proved, and enter judgment on the verdict in favor of plaintiff.

Under the circumstances it is further ordered that the statutory costs in this court be not allowed.

E. M. NAGEL v. HENRIETTA S. DEAN.[1]

December 23, 1904.

Nos. 14,161—(62).

Unrecorded Plat.

In the absence of statutory regulation, the effect of a conveyance of urban property in accordance with descriptions contained in an unrecorded plat is to dedicate streets and alleys therein described to the public use.

Statute.

Since the adoption of chapter 168, p. 174, Laws 1899, a purchaser of lands conveyed with reference to such a plat is entitled, as between himself and his grantor, to the benefit of the use of streets and alleys, subject, however, to the approval of said plat by the village council.

Appeal by defendant from an order of the district court for Wright county, Giddings, J., denying a motion for a new trial. Modified.

George R. Robinson, for appellant.

J. T. Alley, for respondent.

DOUGLAS, J.

Appeal from an order of the district court of Wright county denying defendant's motion for a new trial. This action was brought for equitable relief, praying, among other things, that defendant be required to acknowledge and file in the office of the register of deeds of Wright county a plat purporting to subdivide a tract of land owned by her

[1] Reported in 101 N. W. 954.

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situated in the village of Buffalo, in said county. At the hearing it was mutually stipulated that H. T. Moland, county surveyor of Wright county, make a statement in the form of a plat, noting all measurements, courses, and distances relative to the lots and streets embraced in the said premises, being a duplicate of the plat made by defendant and described in the pleadings. Each party moved for judgment upon the pleadings and stipulated facts. From admissions made in the answer it appears said land was owned and platted by defendant in 1893, and a portion thereof conveyed to plaintiff in 1902, in accordance with the descriptions contained in said plat. She now refuses to acknowledge the plat, or present it to the village council of said village for approval, or to record the same, but offers to convey the premises to the plaintiff by general description.

In the absence of statutory regulation, it is clear, where a party conveys urban property in accordance with descriptions contained in an unrecorded plat, that the effect is to dedicate streets and alleys therein described to the public use. This was early held in Hurley v. Mississippi & R. R. Boom Co., 34 Minn. 143, 24 N. W. 917, and followed in Borer v. Lange, 44 Minn. 281, 46 N. W. 358; State v. St. Paul, M. & M. Ry. Co., 62 Minn. 450, 64 N. W. 1140; Smith v. City of St. Paul, 69 Minn. 276, 279, 72 N. W. 104, 210. Complainants purchasing with reference to such a plat are entitled, as between themselves and the grantor, to the benefit of the use of the streets and alleys purporting to be dedicated to the public use. Corning v. Woolner, 206 Ill. 190, 69 N. E. 57; City v. Anderson (Tex. Civ. App.) 78 S. W. 261. See also Clark v. City, 40 N. J. L. 172; Elliott, Roads & S. § 120.

However, by chapter 168, p. 174, of the Laws of 1899, the legislature prohibited the recording of such a plat in the office of the register of deeds until first approved by the village authorities. This act declaratory of the public policy of the state was adopted subsequent to the decisions of this court in the cases cited, but prior to the execution of said deed to plaintiff. While, as between the parties, a conveyance of urban property in accordance with descriptions contained in a plat will estop the grantor from thereafter reserving to himself, without the consent of the grantee, the exclusive use of streets and alleys so dedicated, still it follows the rights of each are subject to

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legislative regulation. Without it the owner of property might so subdivide and plat the same as to render streets and alleys unfit for public use because of eccentric description or width. The public, which is represented under the terms of said act by the village council, is therefore interested in the subject. In directing that said plat be executed and acknowledged by defendant and filed in the office of the register of deeds without having first been approved by said village council, the court, in disregarding the requirements of this act, in our opinion, erred.

The order of the trial judge is therefore modified, with directions to amend the conclusions of law and order for judgment so as to command defendant to complete, execute, and acknowledge said plat, and present it to the village council for approval or rejection, and, provided said council approves the same, thereafter file it in the office of the register of deeds of said county for record; and provide further, in case the defendant neglects to comply with said order, that the plat found by the court to have been originally made by said defendant be perfected and presented to the said village council for approval or rejection. It is further ordered that statutory costs in this court be not allowed.

C. H. HOLDEN v. KINSEY MAXFIELD.[1]

December 23, 1904.

Nos. 14,165—(124).

Conversion—Charge to Jury.

In an action to recover the value of a carload of grain shipped to defendant, a commission merchant, by plaintiff, it is *held* that the evidence sustains the verdict, and that there were no reversible errors in the charge of the court to the jury, nor in the admission or exclusion of evidence.

Action in the district court for Hennepin county to recover from defendant $265.71, and interest, for the conversion of a carload of grain.

[1] Reported in 101 N. W. 955.

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The case was tried before Harrison, J., and a jury, which rendered a judgment in favor of plaintiff for the sum demanded. From an order denying a motion for a new trial, defendant appealed. Affirmed.

Wm. H. Hallam, for appellant.

S. B. Wilson and *L. J. Van Fossen,* for respondent.

BROWN, J.

Action to recover the proceeds of a carload of grain alleged to have been shipped to defendant by plaintiff for sale. Plaintiff had a verdict in the court below, and defendant appealed from an order denying his motion for a new trial.

One Thorstensen was a grain dealer at Amboy, this state, and had issued numerous warehouse receipts for grain stored and deposited with him, a number of which were issued to plaintiff in this action, and the Bank of Amboy had purchased a large number issued to other depositors of grain. On July 2, 1903, there was shipped to defendant, a grain commission merchant at Minneapolis, for sale and remittance to the owners, a number of cars of grain from the Thorstensen warehouse. Among them was the car in question, which was shipped in the name of the plaintiff, who claims that the grain therein belonged to him. The other cars were shipped in the name of the bank. The car in question was received by defendant, but he refused to account for the proceeds to plaintiff, and this action followed. The defense to the action was that plaintiff was neither the owner nor the shipper of this particular grain; that it in fact belonged to Thorstensen, who was heavily in debt and on the verge of bankruptcy, and that the shipment was made in the name of plaintiff as a pretense and cover to keep the same from Thorstensen's creditors; that, at the time the grain was received by defendant, Thorstensen was indebted to him in a sum nearly equal to the value of the grain shipped. The sole question in this case, under the issues presented by the pleadings, was the ownership of the grain—whether it belonged to plaintiff or to Thorstensen.

Defendant contends that the verdict of the jury is not sustained by the evidence; that it should be vacated and set aside, and a new trial granted. The evidence in support of plaintiff's claim, though in some respects contradictory and not wholly free from suspicion, tends to

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support the verdict, and it cannot be set aside. Plaintiff was a farmer, and had delivered to Thorstensen a large quantity of grain for storage in the latter's warehouse, and at the time in question held warehouse receipts for the grain so stored, and the claim in his behalf is that the grain in question was turned over to him in satisfaction of such receipts. The witnesses were before the trial court, and it had opportunity to observe their demeanor while on the stand, and their apparent candor and truthfulness; and its approval of the verdict of the jury gives weight to the result reached, which the contradictions in the evidence tending to show plaintiff's title to the grain do not overcome.

At the time the grain in question was shipped to defendant a number of other cars of like grain were also shipped by the bank, which held wheat receipts against Thorstensen. One Fuller, an officer of the bank, attended to the matter of shipping the grain, and procured from the railway station agent a bill of lading for the car in question, and delivered it to plaintiff. In this connection the court charged the jury that it was immaterial whether Fuller went to the agent and actually had the bill of lading signed, or whether some other person did so; and of this instruction defendant complains. The instruction, taken in connection with what the trial court said to the jury on this subject, relieves it from any criticism. The language of the court was:

> It is not very material whether Fuller went there and actually had this bill of lading signed, or some other person. It is a question for you to determine what this transaction actually was—whether the shipment was one made in the name of Holden to cover up and conceal the fact that Thorstensen was actually the owner and entitled to the proceeds of this grain, or whether in fact Holden was the owner.

It was not the intention of the court in giving this instruction to eliminate from the consideration of the jury, in determining the ownership of the grain, the fact that Fuller, an officer of the bank, shipped the grain and procured the bill of lading from the station agent. What the court intended was simply that the fact that Fuller attended to that branch of the business was not of controlling importance in the case.

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Defendant also complained of the charge of the court to the jury respecting the burden of proof. On this subject the court said:

> With reference to the burden of proof, it rests in this case upon the plaintiff to show that this grain was shipped by him, or by some one on his behalf. The grain was shipped in his name, and was received and reported upon by the defendant as Mr. Holden's grain, and if there was any fraud in this transaction, the burden of proof is upon the defendant, who has alleged it, to show it.

There was no error in this instruction. As applied to the issues presented by the pleadings, it was a correct statement of the law of the case. Plaintiff had alleged that he was the owner of the grain and entitled to the proceeds of the same, and clearly the burden of proof was upon him to establish that fact. Defendant alleged in his answer that plaintiff was not the owner; that, although the grain was shipped in his name, it was so shipped as a cover, and to cheat and defraud the creditors of Thorstensen; and the burden to prove this alleged fraud was upon defendant.

We have examined all the other assignments of error, and discover no reason for interfering with the order appealed from. The charge of the court, taken as a whole, was a clear and fair statement of the issues in the case, and of the principles of law applicable thereto.

Order affirmed.

J. M. ANDERSON v. W. J. DYER & BRO. and Others.[1]

December 23, 1904.

Nos. 14,193—(221).

Pleading—Conspiracy.

A complaint which sets forth that several distinct corporations, owning a majority of the stock of an independent company, have conspired together to deprive the plaintiff of stock owned by him in the latter, or its application on a note which he had pledged as collateral for his stock, and denied such owner an accounting of profits, while pro-

[1] Reported in 101 N. W. 1061.

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posing to conduct its business to prevent him from deriving benefits therefrom, states a cause of action for equitable relief.

Joinder of Causes of Action.

In a complaint where equitable jurisdiction is invoked, to which incidental claims are subsidiary, although the latter may disclose separate and distinct causes of action, they are not improperly joined.

Demurrer—Defect of Parties.

A demurrer to a complaint upon the ground that there is a defect of parties is insufficient unless it states specifically wherein such defects consist, and names the parties omitted.

Separate appeals by defendants, W. J. Dyer & Bro., Duluth Music Company and W. J. Dyer, from an order of the district court for Ramsey county, Brill, J., overruling their separate demurrers to the complaint. Affirmed.

Franklin H. Griggs, for appellants.

The complaint does not state a cause of action as against either defendant. 2 Cook, Corp. (5th Ed.) § 684; Zellerbach v. Allenberg, 99 Cal. 57.

The plaintiff's claim is more than stale, and has long been barred by the statute. 6 Enc. Pl. & Pr. 404–406.

The attempted causes of action have been improperly joined. 2 Cook, Corp. (5th Ed.) §§ 646, 647.

Koon, Whelan & Bennett, for respondent.

Demurrer for defect of parties will not lie unless the same is apparent upon the face of the pleading. No such defect is apparent and no such defect is pointed out. Minneapolis Harvester Works v. Libby, 24 Minn. 327; Reynolds v. La Crosse & Minn. P. Co., 10 Minn. 144 (178); Mendenhall v. Duluth Dry Goods Co., 72 Minn. 312. A complaint is not demurrable for misjoinder of parties nor for excess of parties. Hoard v. Clum, 31 Minn. 186; Lewis v. Williams, 3 Minn. 95 (151). The most vital objection to the demurrer on this ground is that the demurrer does not specifically show wherein the alleged defect consists, naming the person or persons who should have been joined. This is absolutely essential. Jaeger v. Sunde, 70 Minn. 356; Graham v. City of Minneapolis, 40 Minn. 436; Davis v. Chouteau, 32 Minn. 548; Jones v. City of Minneapolis, 31 Minn. 230.

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More than one cause of action is not stated. This is a bill in equity. Although the facts are voluminous and complicated, but one single primary right is alleged and one single primary wrong is complained of; every other right or wrong mentioned or set forth being but a special subordinate right or wrong included in and flowing from the primary right and wrong set forth. Where several grounds for relief are stated, but all arising out of the same series of transactions and relating to the same subject-matter, and they can be conveniently settled in one suit, the bill is not multifarious. Rosenstein v. Burns, 41 Fed. 841; Lenz v. Prescott, 144 Mass. 505; Brown v. Guarantee T. & S. D. Co., 128 U. S. 403; Woolley v. Pemberton, 41 N. J. Eq. 394; Wells v. Bridgeport Co., 30 Conn. 316; Chaffin v. Hull, 39 Fed. 887; Palmer v. Tyler, 15 Minn. 81 (106); Jones v. Morrison, 31 Minn. 140; Mitchell v. Bank of St. Paul, 7 Minn. 192 (252); North v. Bradway, 9 Minn. 169 (183); Nichols v. Randall, 5 Minn. 240 (304).

But admitting, for the sake of the argument, that several causes of action are united in the complaint herein, then said causes of action are properly joined because they are included in and arise out of the same transaction, or transactions connected with the same subject of action, within the provisions of the first subdivision of section 5260, G. S. 1894.

The demurrer must be overruled if one good cause of action is stated in the complaint. First Nat. Bank v. How, 28 Minn. 150; Grant v. Grant, 53 Minn. 181; Vaule v. Steenerson, 63 Minn. 110; Miller v. Rouse, 8 Minn. 97 (124); Gammons v. Johnson, 69 Minn. 488.

The complaint states at least one good cause of action. Upon the allegations of the complaint plaintiff is entitled to have the earnings of the Duluth Music Company applied to the payment of his note and to have the note and stock delivered to him. While it is true that a minority stockholder cannot ordinarily resort to the courts to compel the corporation to declare a dividend, yet where the dividend is withheld not for any lawful purpose, but for the purpose of defrauding a stockholder, he may have the aid of equity to enforce his rights. 2 Cook, Corp. (5th Ed.) § 545. A bill in equity is the proper remedy to obtain possession of certificates of stock. 2 Cook, Corp. (5th Ed.) § 579; Hasbrouck v. Vandervoort, 4 Sandf. 74; Bryson v. Rayner, 25 Md. 424; Beatty v. Sylvester, 3 Nev. 228.

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Counsel cannot raise the point that an action is barred by the statute of limitations under a general demurrer. Trebby v. Simmons, 38 Minn. 508; Hardwick v. Ickler, 71 Minn. 25; Gilbert v. Hewetson, 79 Minn. 326; Schmitt v. Hager, 88 Minn. 413. Where relief is demanded on the ground of fraud, the party applying for the relief should not be estopped from recovery on the ground of laches, unless he has had full knowledge of the wrongful acts themselves. Marcotte v. Hartman, 46 Minn. 202; Hayes v. Carroll, 74 Minn. 134; Wall v. Meilke, 89 Minn. 232; 2 Pomeroy, Eq. Jur. §§ 917, 918.

LOVELY, J.

This appeal is from an order overruling the several demurrers of defendants to plaintiff's complaint.

The following material facts are set forth in the challenged pleading: Two of the three defendants are corporations of the state of Minnesota. The Duluth Music Company was organized October 1, 1889, with a capital stock of $50,000, $10,000 of which was paid in upon its organization. Plaintiff purchased thirty shares, the par value being $100 each, described in three certificates which were issued to him. In payment he executed his promissory note on the same day, payable to the order of W. J. Dyer & Bro., defendant, with interest at eight per cent. Plaintiff also transferred as collateral security for the notes his certificates of stock, which were accepted; and it was understood between the parties to the transfer that there was to be no formal transfer of such stock on the books of the Duluth Music Company, except in case of failure of plaintiff to comply with the terms of his note. It was also further agreed that the certificates should be returned to the plaintiff upon the fulfilment of the terms of the note. Plaintiff became the president of the Duluth Music Company upon its organization, and continued to hold that position until 1897. He resided at Duluth, in the active management of its business, until the spring of 1895, when, at the request of the defendant W. J. Dyer & Bro., he went to Minneapolis, and assumed the presidency of another company in which W. J. Dyer & Bro. was interested, but continued to conduct the business of the Duluth Music Company by correspondence until 1897, at which time he ceased to hold the position of presi-

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dent, and the books of the Duluth Music Company were removed to St. Paul by W. J. Dyer & Bro., where they have ever since been kept.

It is further set forth that the business of the music company has been prosperous, and that W. J. Dyer and the W. J. Dyer & Bro. corporation have conspired together with the Duluth Music Company, who together own a majority of its stock, to prevent any declaration of dividends to the stockholders therein, and have never at any time made or declared any dividend, although the accumulations of the corporation in excess of its capital stock amount to over $70,000. And it is inferentially stated, at least, that such stock was issued to the defendants without consideration, and that the earnings of the thirty shares of stock in the Duluth Music Company, represented by the certificates held by plaintiff and hypothecated to W. J. Dyer & Bro., have been and are sufficient to pay his note of $3,000, with interest thereon, in full, and leave a large amount over and above the principal and interest to which plaintiff is entitled as a stockholder.

It is further set forth that, after the plaintiff severed his connection with the Duluth Music Company, he demanded of its officers and directors permission to inspect and examine its books of account and records, but that such company and its officers, conspiring together with defendants W. J. Dyer and W. J. Dyer & Bro. to defraud this plaintiff of his interest in his stock, refused and still refuse to permit or allow such an examination.

It is further set forth that the two defendants W. J. Dyer & Bro. and Dyer have conspired to avoid a distribution or division of the proceeds of the music company to its stockholders, to prevent the payment of the note of plaintiff, and deprive him of his rights in the stock of the music company; that a demand has been made for the return of the note and the certificates of stock held by plaintiff in the Duluth Music Company, but that such demand has not been complied with. It is further alleged that the defendants Dyer and W. J. Dyer & Bro., to defraud the plaintiff, have received and made upon the books of the company an apparent, but fraudulent, cancellation of the plaintiff's certificates of stock which had been pledged as collateral for the note of plaintiff, for the purpose of destroying evidence of the ownership of the stock by plaintiff, and have also refused to issue or deliver to plaintiff other certificates of stock in the music company, repre-

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senting and evidencing the thirty shares which he now owns therein, without authority; that plaintiff is still the owner of such stock, and entitled to the advantages and rights of a stockholder in the corporation, which he is denied.

In the plaintiff's demand for relief, it is asked that the Duluth Music Company be restrained from canceling or transferring his stock therein; that this corporation be required to make an accounting of its business and affairs from October 1, 1889, to date; that the stock issued by it without consideration be canceled; that the company be compelled to declare a dividend of its earnings and undivided profits; that out of the same may be paid the amount due on his note, and the remainder be paid to plaintiff; that the W. J. Dyer & Bro. corporation be required to surrender up to plaintiff his note, and also to account to the plaintiff for any amount unpaid thereon, if it should so appear, with other relief.

The separate demurrer of each of the defendants is upon the following specific grounds: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) that several causes of action are improperly united; (3) upon the ground that there is a defect of parties plaintiff and defendant. The demurrers were respectively overruled.

There are many allegations in the complaint which are superfluous, consisting of unnecessary repetitions; but we have compressed what was regarded by the trial court as material, and all that is necessary and sufficient, in our judgment, for the proper determination of the questions required to be considered on this review.

While it is true that the courts cannot ordinarily compel a corporation to declare a dividend at the suit of a minority stockholder, yet it is not to be doubted that where dividends are withheld for an unlawful purpose—to deprive a particular stockholder of his rights—he may have the aid of equity for adequate protection. It appears in this complaint that the earnings and surplus of the company amounted to more than $70,000, upon an authorized capital of $50,000; that a portion of the capital stock has not been issued, and that the failure and refusal to declare a dividend is for the purpose of defrauding plaintiff; that the two defendants Dyer and W. J. Dyer & Bro. have conspired with the Duluth Music Company to prevent the payment of plaintiff's

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note of $3,000, for which his own stock is pledged as collateral; that, with that purpose, the stock has been turned over to the music company, to be canceled upon the books of the company. Under such circumstances, it is too plain to admit of doubt, as held by the trial court, that these facts entitled plaintiff to some relief.

The alleged combination of all defendants not only to prevent dividends from being declared for an unlawful purpose, but to be applied on the payment of the note, would at least entitle the plaintiff to an accounting, and an application of such amounts as are found to be due him for his benefit. An accounting is peculiarly within the jurisdiction of a court of equity. The W. J. Dyer & Bro. Company, which held the note of plaintiff under an agreement to apply the dividends, was in duty bound, on his request, to furnish him the information which was withheld in violation of its trust; and it may be stated generally that, wherever there is a fiduciary relation between a trustee and his beneficiary, the right to have an accounting in equity is based upon the existence of the trust, and will be ordered to enforce the same, if wrongfully refused. Brown v. Maplewood Cemetery Assn., 85 Minn. 498, 89 N. W. 872. The purpose of the different defendants in carrying out their alleged conspiracy to cancel his stock also furnishes, if established, grounds for equitable relief.

We are satisfied that the general demurrer was properly overruled, even though it should appear that other causes of action had been involved in the main contention, for if, in respect to the first ground of demurrer, the facts stated entitled plaintiff to a portion of the relief sought, it was properly overruled.

With reference to the claim that causes of action have been improperly joined, it seems very clear that the main or primary transaction, the hypothecation of the note and the alleged manipulation of the stock to defeat plaintiff's rights, furnishes the main ground for relief. No separate causes are distinctively designated as such, and, if it does appear from the whole complaint that more than one cause is embraced therein, which we do not decide, they were not inconsistent, but were incidental and subsidiary to such primary cause of action; and it may be said generally that, where equity obtains jurisdiction, it will be retained and exercised to give full and adequate relief in all respects. This is elementary. What this may be can only be deter-

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mined upon a hearing, but we are clear that we are not authorized to hold that the jurisdiction invoked here can be deprived of full efficacy by holding that separate causes of action have been improperly joined.

The demurrer to the complaint on the ground that there is a defect of parties is itself substantially defective, since it does not specifically show wherein the alleged defect consists; naming the person or persons who should have been joined. This is absolutely essential. Davis v. Chouteau, 32 Minn. 548, 21 N. W. 748; Jaeger v. Sunde, 70 Minn. 356, 73 N. W. 171.

Order overruling demurrers is affirmed.

THOMAS S. McCLURE v. CAROLINE E. CLARKE and Others.[1]

December 23, 1904.

Nos. 14,200—(133).

Vacating Judgment.

Upon the undisputed facts stated in the opinion, *held*, the trial court erred in relieving respondent from default and permitting her to answer.

Appeal by plaintiff from an order of the district court for Stearns county, Baxter, J., opening a judgment by default as to defendant Caroline E. Clarke and permitting her to answer and defend. Reversed.

Taylor & Jenks and *Geo. H. Reynolds,* for appellant.

Stewart & Brower, for respondent.

DOUGLAS, J.

Appeal by plaintiff from an order of the district court of Stearns county relieving the defendant Caroline E. Clarke from default therein and allowing her to answer.

This was an action to quiet title, and summons was served upon said defendant personally January 30, 1902. An order for judgment

[1] Reported in 101 N. W. 951.

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was duly made against her on December 31 following, but the entry thereof was deferred until April, 1904. From the affidavit of defendant it appears that shortly after its service she handed the summons to her husband and general agent, Nehemiah P. Clarke, who was also a defendant. An attorney was not employed by either of them prior to March, 1904, over two years subsequent to such service, at which time the pending application for leave to answer was made, and no excuse or explanation whatever was given for such long delay or neglect except that defendant assumed her husband, to whom the summons had been transferred, would attend to the matter.

While the trial court has a wide discretion in relieving from defaults in proper cases, still it has always been held to be a judicial discretion, not to be exercised capriciously or arbitrarily. The following cases illustrate in many phases the rule adopted: Altmann v. Gabriel, 28 Minn. 132, 9 N. W. 633; People's Ice Co. v. Schlenker, 50 Minn. 1, 52 N. W. 219; Osman v. Wisted, 78 Minn. 295, 80 N. W. 1127; McMurran v. Bourne, 81 Minn. 515, 84 N. W. 338; Crane & Ordway Co. v. Sauntry, 90 Minn. 301, 96 N. W. 794; White v. Gurney, 92 Minn. 271, 99 N. W. 889.

In the application at bar it was not suggested that neglect to answer was based upon fraud, inadvertence, or mistake; therefore a foundation was not laid for the exercise by the trial court of any discretion. The court was simply called upon to set aside a default which had existed over two years, upon the naked request of defendant, because it met the pleasure of herself and general agent to refrain from complying with the regular rules of procedure provided by the legislature for the guidance of litigants. We are of the opinion the court erred in affording the relief prayed for.

Order reversed.

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LESTER PATTERSON and Others v. BARBER ASPHALT PAVING COMPANY and Others.[1]

December 30, 1904.

Nos. 14,019—(114).

Paving Contract—Injunction—Another Action Pending.

In this action—one to determine the validity of a contract between the city of Mankato and the Barber Asphalt Company, and for an injunction restraining and enjoining the asphalt company from paving a street of the city under the contract, and the city from incurring any indebtedness on account of the same—it appears that part of the work contemplated by the contract was performed, and, as to the balance, that after the commencement of this action the contract was abandoned and canceled by the mutual consent of the parties; that an action brought by the asphalt company against the city of Mankato is pending in the United States Circuit Court, to recover for the part of the contract performed, in which the city is defending and resisting its liability. It is *held* (1) that plaintiffs have the right to continue the prosecution of the action for the purpose of having determined the validity of the contract; (2) that the facts disclosed by the pleadings do not bring the case within the rule that, where it appears in an action for an injunction that a change of circumstances after the suit is commenced renders an injunction unnecessary, it will not be granted; and (3) that the pendency of the action in the United States court is not a bar to this action.

Appeal by defendant Barber Asphalt Paving Company from an order of the district court for Blue Earth county, Lorin Cray, J., overruling a general demurrer to the reply to defendant's separate answer to the amended and supplemental complaint. Affirmed.

How, Taylor & Mitchell and *Pfau & Pfau,* for appellant.

H. L. & J. W. Schmitt, for respondents.

BROWN, J.

The facts in this case are as follows: The action was commenced in 1902 against the Barber Asphalt Paving Company, as sole defendant. The original complaint alleged that plaintiffs were residents and tax-

[1] Reported in 101 N. W. 1064; 102 N. W. 176.

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payers of the city of Mankato, and owners of property abutting on Broad street, between Warren and Lincoln streets; that in 1898 said street was, by the authority of the city, curbed, graded, and boulevarded at the expense of owners of abutting property; that, under a contract made and entered into with the city of Mankato subsequent to such improvements, defendant threatened and intended to enter upon the portion of Broad street so abutting plaintiffs' property, and take out, damage, and destroy the improvements so made by the city for the purpose of paving the same. It alleged that the contract under which defendant proposed to destroy those improvements was entered into between it and the city without authority of law, and was void. Defendant answered, admitting that it was about to enter upon the street in question for the purpose of paving the same, and justified its intended action under a contract alleged to have been duly entered into with the city of Mankato to pave Broad street from Vine to Lincoln street, which included the portion abutting plaintiffs' property. Plaintiffs replied to the answer, setting up certain irregularites in the proceedings leading up to the making of that contract, which they claimed rendered the same void.

Upon the issues thus framed a temporary injunction was issued by the court below, restraining defendant asphalt company from entering upon the street abutting plaintiffs' property, or in any manner attempting to pave the same. The injunction has at all times since remained in full force; but, after it was issued, defendant, under the contract with the city, proceeded and paved the balance of Broad street, completing the same on July 30, 1902.

Thereafter plaintiffs obtained leave to make the city of Mankato and its officers parties defendant, and file a supplemental complaint. The supplemental complaint set up that plaintiffs were taxpayers of the city, facts tending to show the invalidity of the contract, and prayed not only for an injunction restraining the asphalt company from entering upon Broad street between Warren and Lincoln streets, but from entering upon or paving any part of the street, or taking any steps towards performing the contract for paving the same; that the contract be adjudged void because of irregularities on the part of the city in entering into the same; and that the city and its officers be forever enjoined from levying or collecting any assessments upon the abut-

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ting property in payment for work performed under the contract. No answer was interposed to the supplemental complaint until April, 1904, more than a year after it was served.

In the meantime the action of Diamond v. City of Mankato—an action involving the same contract—was brought by Diamond, a taxpayer, for the purpose of determining its validity, and restraining and enjoining the city and its officers from paying out of the city treasury any money on account of the same. In that action the contract was adjudged void by the court below, and the decision was affirmed on appeal to this court. Diamond v. City of Mankato, 89 Minn. 48, 93 N. W. 911. Defendant asphalt company was not a party to that action, and is not bound by the judgment therein.

Thereafter, in February, 1904, the asphalt company brought suit against the city of Mankato in the Circuit Court of the United States for work and labor performed under the contract, in which action the city interposed the defense that the contract was void and of no validity. The action was tried in the Circuit Court, and resulted in a recovery by plaintiff, the court holding that the contract was valid, and is now pending on appeal in the Circuit Court of Appeals.

In April, 1904, defendant asphalt company obtained leave from the court below to interpose an answer to the supplemental complaint in the case at bar. The answer sets up in detail the history of the controversy between the parties, the commencement and result of the action of Diamond v. City of Mankato, and that, after the decision in that action, defendant abandoned the contract, and was released by a formal resolution of the city council from further obligations in the performance of the same, specifically denying the allegations of the supplemental complaint to the effect that it intended and threatened to continue work under the contract. To this answer plaintiffs replied, admitting the allegations of the answer contained in paragraph 8—those just referred to—to which reply the asphalt company interposed a general demurrer.

Upon the argument of the demurrer in the court below, the parties entered into a stipulation which they agreed might be considered in connection with the pleadings and demurrer. The stipulation provided that the court might consider, in determining the demurrer, the fact that before the answer was served the asphalt company commenced an

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action in the Circuit Court of the United States against the city to recover the amount claimed to be due it for the portion of the street paved; that the city of Mankato duly answered in the case, denying its liability, and insisted that the contract under which plaintiff sought to recover therein was void, and that the city was under no obligation to compensate plaintiff for work performed or material furnished thereunder; also that subsequent to the decision in the Diamond case the work of paving the street under the contract was abandoned by the asphalt company, and that since that time the company has not attempted to complete the same, and does not intend to do so; that the city council of Mankato duly passed a resolution, with the consent of the asphalt company, canceling the contract, and releasing the company from any liability to pave or improve that portion of the street abutting the property of plaintiffs in this action. The trial court overruled the demurrer, and the asphalt company appealed.

We are of opinion that the order appealed from should be affirmed. The only question now before us is whether, in view of the conceded facts, there remain any disputed questions under the pleadings to be litigated. Counsel for appellant invoke the rule that, where it appears in an action for injunction that there is a change of circumstances after suit is commenced which renders the injunction unnecessary, it will not be granted. But the case does not come within the rule. The original action was brought against the asphalt company as sole defendant, and the relief demanded was that defendant be restrained and enjoined from performance of the contract with the city for paving that portion of the street in question which abuts upon plaintiffs' property. Neither the city nor its officers were parties to the action, and the validity of the contract, though in a measure involved, was not the primary object of the action, except in so far as it involved plaintiffs' property. By the supplemental complaint, however, the scope of the action was broadened. The city and its officers were made parties defendant, and the relief demanded was that the contract be adjudged a nullity because of irregularities in the proceedings leading up to its execution; that the defendant asphalt company be restrained and enjoined from performing the same; and other relief similar to that prayed for in the original complaint, and generally for such other and further relief as might seem just and equitable.

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It may be that the action was limited originally to the rights of owners of abutting property, but by the supplemental complaint they not only bring their action as owners of property abutting the street intended to be improved by the contract with the asphalt company, but as general taxpayers; and the relief demanded is that the contract be adjudged invalid, and that the city and its officers be restrained and enjoined from making any of the citizens of Mankato in any manner liable for the expense of the proposed improvement. The mere fact that the contract has been abandoned, so far as it relates to the portion of the street fronting the property owned by plaintiffs, and that the city council has canceled the contract as to that portion of the street, is not fatal to plaintiffs' right to continue the prosecution of the action. A large part of the street was paved and the contract performed by the asphalt company, and, if the contract be held valid, the city would be liable for the debt thus incurred, which can be paid only by a general tax levy on the property of the residents of the city. At the time of the commencement of the action, plaintiffs had a good cause of action, and still have, for the purpose of having determined the validity of the contract. If they succeeded in establishing its invalidity, they would be entitled to an injunction restraining the city authorities from paying the indebtedness incurred thereby, either by a tax for that purpose or otherwise.

It is immaterial, too, that the city is now contesting its liability in the United States Circuit Court. The jurisdiction of the United States Circuit Court and that of the state courts is concurrent. An action may be pending there, and also in the state court, involving the same questions, and neither be a bar to the other.

Our conclusions are in harmony with those of the trial court, and its order in the premises is affirmed.

An application for reargument having been made, on January 18, 1905, the following opinion was filed:

PER CURIAM.

Our attention has been called, in an application for reargument of this cause, to the case of City of St. Paul v. Mullen, 27 Minn. 78, 6 N. W. 424, wherein it is held, in effect, that, although local improvement

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proceedings conducted by the city of St. Paul were illegal, the municipal authorities might, nevertheless, under the provisions of the city charter, which are similar to those in the charter of Mankato, assess the cost and expense of the improvement to abutting property. The point is made that that case controls the one at bar, and is conclusive that plaintiffs, who were not owners of property on the portion of the street paved, are not entitled to maintain this action as general taxpayers.

Whether this position is sound should not be determined in the absence of the property owners to be affected by such a result, and we leave the question open. The owners of the property abutting the portion of the street paved are not parties to this action. And as it does not appear whether the cost of paving at street intersections is to be borne by the property owners or the city, and as the contract expressly exempts the property owners from paying any portion of the expense incident to property belonging to the city of Mankato, plaintiffs, as general taxpayers, have at least the right to be heard upon the question whether these items of expense may be paid out of the general fund in the city treasury, or by a general levy of taxes.

Application for rehearing denied.

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JOHN GRANT and Another v. ENOCH F. BERRISFORD and Another.[1]

December 30, 1904.[2]

Nos. 14,028—(80).

Municipal Charter.

The requirement of the constitutional amendment authorizing cities to frame their own charters, that such charters shall be in harmony with and subject to the constitution and laws of the state, does not forbid the adoption of charter provisions as to any subject appropriate to the orderly conduct of municipal affairs, although they may differ in details with those of existing general laws.

Contractor's Bond.

The subject of contractors' bonds, to secure the performance of contracts with a city and the payment of laborers and materialmen, including the contents of the bonds and conditions and limitations as to their enforcement, is germane to the subject of municipal legislation.

[1] JOHN GRANT and Another v. ENOCH F. BERRISFORD and Another.

SAME v. JAMES G. DONNELLY and Another.

SAME v. JOHN H. DONOHUE and Another.

December 30, 1904.

Nos. 14,029, 14,030, 14,031—(81, 82, 83).

Appeal by defendants in each case from an order of the district court for Ramsey county, Brill, J., overruling a demurrer to the complaint. Affirmed.

R. A. Walsh and *D. E. Dwyer*, for appellants.

B. H. Schriber, *A. E. Horn*, *F. H. Ewing* and *Wm. F. Hunt*, for respondents.

PER CURIAM.

The question for our decision in each of these cases is identical with the one decided in the case of Grant v. Berrisford. We therefore hold, following the case cited, that each of the orders appealed from in these cases must be affirmed.

Orders affirmed.

[2] Reported in 101 N. W. 940, 1,113.

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Application of Statute.

The provision of section 3, c. 307, p. 568, Laws 1897, providing that no action shall be maintained on a contractor's bond unless written notice is given to the principal and sureties within ninety days after the last item of labor or materials is performed or furnished, has no application to contractors' bonds given pursuant to the citizens' charter of St. Paul.

Appeal by defendants from an order of the district court for Ramsey county, Brill, J., overruling a general demurrer to the complaint. Affirmed.

R. A. Walsh and *D. E. Dwyer,* for appellants.

B. H. Schriber, A. E. Horn, F. H. Ewing and *Wm. F. Hunt,* for respondents.

START, C. J.

Action by a materialman upon a contractor's bond given January 15, 1903, to the city of St. Paul, pursuant to the provisions of its charter, for the benefit of all persons who might perform labor or furnish materials in the execution of the contract. The defendants, who are sureties on the bond, interposed a general demurrer to the complaint. They appealed from an order overruling the demurrer.

The complaint alleges that on January 15, 1903, the principal in the bond, William J. Preston, entered into a contract with the city of St. Paul for the construction of a sewer in one of its streets; that, pursuant to the provisions of the city charter, the defendants executed to the city a bond conditioned upon the performance of the contract, and the payment as they should become due of all just claims for labor performed and materials furnished in the execution of the contract, and the saving of the city harmless in the premises; and, further, that the plaintiffs furnished the contractor, at his request, certain materials, of the agreed price and value of $195.65, which were used by him in the performance of the contract. The complaint, however, did not allege that the plaintiffs, within ninety days after furnishing the last item of such material, served upon the principal and sureties in the bond a written notice specifying the nature and amount of their claim, and the date of furnishing the last item of the materials, as provided by Laws 1897, p. 568, c. 307, § 3. The provisions of this general law, so

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far as here material, are to the effect that no contract entered into by any municipality of the state for the construction of any public improvements shall be valid unless the contractor gives a bond to the municipality to pay as they become due all just claims for all labor performed or material furnished in the execution of the contract, and to save the municipality harmless in the premises.

> No action shall be maintained on any such bond unless the plaintiff, within ninety days after performing the last item of work or furnishing the last item of skill or material, shall serve upon the principal and the surety or sureties in said bond a written notice specifying the nature and amount of plaintiff's claim, and the date of furnishing the last item of said work, skill or material.

The charter of the city of St. Paul was adopted in the year 1900, pursuant to the constitutional amendment allowing cities to frame their own charters. Const. art. 4, § 36. This amendment contains, with others, this provision:

> Before any city shall incorporate under this act the legislature shall prescribe by law the general limits within which such charter shall be framed; * * * such charter shall always be in harmony with and subject to the constitution and laws of the state of Minnesota.

The charter contains provisions for the construction of public improvements, the letting of contracts therefor, and the giving of a bond by the contractor. The provision for giving such bond is in substantially the same terms as that contained in the general law, except it differs as to the amount of the bond, and contains no provision similar to the one we have quoted from the general law.

The sole reason urged by defendants in support of their demurrer is that the provision of the general law requiring notice of the nature and amount of the claims of the beneficiaries of the bond to be given within ninety days after the last item of labor or material is applicable to the city of St. Paul, notwithstanding its charter provisions. This presents the question whether the charter provisions relating to con-

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tractors' bonds are in harmony with and subject to the constitution and laws of the state, as required by constitutional amendment.

If this limitation on the power of cities in framing their charters is to be construed as prohibiting the adoption of any charter provisions relating to proper subjects of municipal legislation and matters germane thereto, unless they are similar to and contain all the provisions of the general laws on the subject, then, as said by the learned trial judge: "All that the framers of a charter can do, where there is a law in existence at the time the charter is adopted, is to add such provisions as are not already contained in the law, and are not repugnant to it. If this is the extent of the power conferred upon cities to make their own charters, then the constitutional grant is a mere form of words, of no practical value." It is clear that such is not a proper construction of the limitation. This limitation forbids the adoption of any charter provisions contrary to the public policy of the state, as declared by general laws, or to its penal code—for example, provisions providing for the licensing of prize fighting or gambling or prostitution, or those which are subversive of the declared policy of the state as to the sale of intoxicating liquor. But it does not forbid the adoption of charter provisions as to any subject appropriate to the orderly conduct of municipal affairs, although they may differ in details from those of existing general laws. This is necessarily so, for otherwise effect could not be given to the constitutional amendment which fairly implies that the charter adopted by the citizens of a city may embrace all appropriate subjects of municipal legislation, and constitute an effective municipal code, of equal force as a charter granted by a direct act of the legislature. State v. O'Connor, 81 Minn. 79, 83 N. W. 498; State v. District Court of Ramsey Co., 87 Minn. 146, 91 N. W. 300; State v. District Court of St. Louis Co., 90 Minn. 457, 97 N. W. 132.

It follows that if the provisions of the charter of St. Paul as to contractors' bonds are germane to any proper subject for municipal legislation, they supersede the provisions of the general law on the subject. It is practically conceded by the defendants that the subject of contracts with the city, and the form, contents, and execution of the bond required of contractors who undertake to do public work, is a proper one for municipal legislation. But they contend that the city has no

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interest in the matter of a limitation on the right of any one, except itself, to bring an action on the bond. The provision in the general law requiring notice within ninety days after the last item of labor or materials is done or performed, before bringing an action on the bond, is not analogous to a statute of limitations, but it is a condition precedent which must be performed before the right to bring an action on the bond accrues. Or in other words, it is a condition or burden placed upon the beneficiaries of the bond which they must perform or remove before they can avail themselves of its benefits. It is as much so as would be the case if this provision of the general statute was set out as a proviso in the bond.

Now, the prompt payment by the contractor for labor and materials used in the execution of a contract with the city for public improvements is a matter in which the city has a direct interest. Such payment is necessary to secure a speedy and honest performance of the contract, for it has a direct tendency to avoid labor strikes, and the withholding of materials for the work by materialmen. Any conditions or burdens which delay or make the enforcement of contractors' bonds more difficult or uncertain tend to increase the cost of labor and materials necessary for the execution of contracts with the city for making public improvements.

We hold, then, that the subject of city contracts for public improvements, and bonds to secure performance of them and the payment of laborers and materialmen, is a proper one for municipal legislation, and that the matter of contractors' bonds, and conditions and limitations as to their enforcement, is germane thereto. State v. District Court of St. Louis Co., supra. It follows that the charter provision in question is exclusive, and that the plaintiffs in this case were not bound to give the notice required by the general statute as a condition precedent to their right to sue on the contractors' bond. The complaint states a cause of action.

Order affirmed.

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STATE v. FRANK MINCKI[1]

December 30, 1904.

Nos. 14,042—(23).

Indictment.

An indictment for grand larceny in the second degree, charging the theft from a building in the daytime of certain described property owned by A. of the value of $10, is sufficient where the building is fully described, but the name of the owner omitted.

Verdict.

Held, upon the consideration of the whole record, that the verdict of the jury finding the defendant guilty of the charge made in the indictment is supported by the evidence.

Evidence.

Certain rulings of the trial court in the admission or exclusion of evidence considered. *Held*, the court either did not err, or that the evidence admitted was not prejudicial to defendant.

Defendant was convicted in the district court for Winona county of the crime of grand larceny in the second degree, and sentenced to confinement in the state prison for one year and two months. From the judgment of conviction, and from an order, Snow, J., denying a motion for a new trial, defendant appealed. Order and judgment affirmed.

Henry M. Lamberton, for appellant.

W. J. Donahower, Attorney General, and *George T. Simpson,* County Attorney, for the State.

DOUGLAS, J.

Defendant appeals from an order overruling his motion for a new trial, and from the judgment of the court in a proceeding which resulted in his conviction of grand larceny in the second degree. He was accused by the indictment of stealing ten sacks of cement of a specified value from a frame building known as the "Diamond Jo Dock," which cement was owned by the Winona Railway & Light Company, a cor-

[1] Reported 102 N. W. 207.

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poration. The sufficiency of the indictment is challenged for the reason that the name of the owner of the building was not alleged. We are of the opinion this was unnecessary. The building from which the property was alleged to have been stolen was sufficiently described to apprise defendant of the charge and enable him to prepare his defense.

It appears from the evidence that two consignments of Portland cement, the property of the Winona Railway & Light Company, were placed in said warehouse for storage in June and September, 1903. The first consignment was delivered to the owner in September, but the sacks were not counted, and whether the exact amount was redelivered is uncertain. The other consignment was redelivered in the fall and winter of 1903. It also clearly appears the defendant was an employée about the warehouse, and engaged in the drayage business, and sold ten sacks of this brand of cement, and delivered it from said building November 19, 1903. Evidence was offered tending to show that when first confronted with the charge the defendant denied that he sold any cement, and that later he stated he found ten sacks of cement upon the warehouse platform during the summer of 1903, placed it apart in the warehouse, and shortly thereafter removed it to another portion of the building directly above the office; that he did not know who owned it, and never made inquiry to ascertain the fact. No other cement was stored therein. As a defense to the charge the defendant offered evidence tending to show a redelivery to the Winona Railway & Light Company of its cement, and the sale by defendant of ten sacks so found, the ownership of which was unknown. Evidence was also offered by the state tending to show that the said ten sacks were not present in the warehouse, either on the lower floor or above the office, at the times asserted by defendant.

From a careful examination of the record, we are of the opinion the evidence originally offered was sufficient to establish prima facie the guilt of defendant, and that the court did not err in overruling his motion to dismiss at the close of the state's case; also that the evidence as a whole supports the verdict of the jury.

The admission and exclusion of certain evidence is in many particulars assigned as error. We are of the opinion that the court in each

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instance did not err, or that the evidence admitted was not prejudicial to the defendant. The rulings complained of may be grouped as follows:

1. The manager of said railway company was asked:

> Would you say that any cement was ever stolen from the Winona Railway & Light Company there on November 19th or any other time?

This question was too general, and also called for the conclusion of the witness.

2. The court admitted evidence tending to show that the defendant offered to sell certain cement sacks. In our judgment, although error, such ruling was not prejudicial.

3. The father of defendant testified on behalf of the state to the storage of cement by the Winona Railway & Light Company in said warehouse. Upon cross-examination the court permitted him to state that there were ten other sacks of cement therein at the time, but sustained an objection to the question as to what became of it. The witness was called by the defendant at a later stage in the trial and testified fully as to what became of the cement. Therefore it becomes immaterial for us to inquire whether the court erred in excluding the answer originally. The defendant was not prejudiced.

4. Neither did the court err in sustaining an objection to the following question addressed to defendant:

> Did you ever take or ever steal any cement or anything else belonging to the Winona Railway & Light Company?

The form of question was immediately changed at the suggestion of the court, and the defendant permitted to testify fully as to the entire subject.

Other errors assigned have been carefully examined, and we are of the opinion the court did not err in its rulings.

Both the order and judgment appealed from are affirmed.

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JENS G. JENSEN v. COMMODORE MINING COMPANY and Another.[1]

December 30, 1904.

Nos. 14,046—(150).

Negligence—Assumption of Risk.

In this, a personal injury action, it is *held* that the evidence is sufficient to sustain the verdict of the jury, to the effect that the cause of the plaintiff's injury was not one of the risks assumed by him, and that the defendants were guilty of negligence which was the proximate cause of his injury.

Action in the district court for St. Louis county to recover $15,000 for personal injuries. The case was tried before Cant, J., and a jury which rendered a verdict in favor of plaintiff for $2,250. From a judgment entered pursuant to the verdict, defendants appealed. Affirmed.

John G. Williams, for appellants.

Samuel A. Anderson and *A. F. Storey,* for respondent.

START, C. J.

Action to recover damages for personal injuries sustained by the plaintiff while he was in the employ of the defendant mining company. Trial by jury, and verdict for the plaintiff for $2,250. The defendants made a motion for judgment in their favor notwithstanding the verdict, which was denied, and judgment entered on the verdict for the plaintiff, from which the defendants appealed.

There was evidence received on the trial tending to show these facts: The defendant mining company, hereafter designated as the company, owned and operated an iron mine known as the Commodore Mine in the county of St. Louis. The defendant McNeill was the superintendent of the mine, and the plaintiff was a skilled mechanic in the employ of the company. There was a shaft extending down into the mine at an angle of about twenty seven degrees from the horizontal to a

[1] Reported in 101 N. W. 944.

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depth of two hundred forty feet. On one side of the shaft was a stairway extending the entire length of the shaft, which was four feet and eight inches wide. On the side of the stairway, and parallel therewith, were two skipways, in which skips or small cars were operated, by which ore was hoisted to the surface. On the day the plaintiff was injured, February 15, 1903, water had accumulated in the bottom of the shaft to the depth of ninety feet. In order to pump this water out, a pump was placed on each of the skipways, one hundred fifty feet from the top of the shaft, and put in operation. When the water had been lowered some forty feet, it became necessary to lower the pumps; and the plaintiff was directed to assist in the work of moving one of them, and, in the due and proper discharge of this duty, he was compelled to, and did, stand upon the stairway, at a point one hundred fifty feet from the top thereof. The superintendent was with him on the stairway at the time. Although the stairway was slippery and dark, except as lighted by candles in the caps of the men, the place where the plaintiff was required to work was a reasonably safe one, if the stairway above him was kept clear while he was at work. The superintendent, without the knowledge of the plaintiff or warning to him, directed two miners to take down the shaft planks, sixteen feet long, eight inches wide, and two inches thick. The planks were to be laid inside the rails of the skipway, between the pump and the water, for the pump to slide down on.

The plaintiff had never seen or known of lumber or other materials being carried down the stairway until after he was injured. The practice in the mine, so far as he knew, was to lower timber and materials into the mine down the skipways by means of rope and tackle. The miners took one plank down at a time, each one taking hold of an end thereof, and placing it under his left arm, and so carried the plank down the stairway past the pump, then crossed over into the skipways and placed the plank in position. Whether the plaintiff knew that planks were being so taken down was, under the evidence, a question of fact. After three or four planks had been so taken down, one of the miners brought a plank to the mouth of the shaft —the other miner then being absent—and put the end of it down the stairway a short distance, resting the lower end on a steam pipe, and the upper end on some timber. The pipe was vibrating, and the lower end

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of the plank slipped off the pipe, shot down the stairway, and struck the plaintiff, knocking him from the stairway and breaking his leg.

The negligence of the defendants, alleged and relied on by the plaintiff, is briefly stated—that, by giving the order to take down the planks and permitting its execution in the way it was attempted, they subjected him to unusual danger and peril, of which he was ignorant, without giving any warning thereof.

The assignment of errors presents for review only this question: Were the defendants entitled to a directed verdict in their favor? They here insist that they were, for the following reasons: First, that the cause of the accident was one of the risks assumed by the plaintiff; second, no negligence on the part of the defendants was shown; third, the defendants' negligence, if any, was not the proximate cause of the plaintiff's injuries, but they resulted from the negligence of a fellow servant.

1. If the plaintiff's testimony, to the effect that he had no knowledge that planks were being carried down the stairway, was true—and of this the jury were the judges—it is clear that he did not assume the risks incident to such use of the stairway. The defendants, in this connection, invoke the rule which obtains in cases involving construction and repair work. The rule has no application to this case, for, if the defendants were negligent, it was because of their own act and omission in giving the order without warning. No question of vice principal is made in this case.

2. The second and third alleged reasons why a verdict should have been directed for the defendants may be considered together, for they are substantially one. The practical question in this case is whether there is any substantial evidence in this case to sustain the finding of the jury that the defendants were guilty of negligence in the premises, for, if they were, the negligence of the fellow servant was only concurrent. Franklin v. Winona & St. Peter R. Co., 37 Minn. 409, 34 N. W. 898; Thomas v. Smith, 90 Minn. 379, 97 N. W. 141.

It might seem at first blush that the taking of planks down this stairway was a feasible and safe way of getting them to the place where they were to be used in the shaft, and that reasonable men could not fairly reach different conclusions on the question. But when attentive consideration is given to all of the particular facts which the evi-

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dence tends to establish, it is quite obvious that they might honestly draw different conclusions therefrom. The plaintiff was working at a place one hundred fifty feet from the top of the shaft, on the stairway, which was wet, slippery, and dark; he was in a reasonably safe place if loose materials did not fall or slide down the stairway, but in one of great peril if they did; he was helpless and unable to protect himself; and the order given by the defendants, with full knowledge of his position, and without warning to him, had a direct tendency to render the place in which he was required to work one of peril, in case of any accident or neglect in executing the order. This is demonstrated by the result.

The question then is, ought the defendants, in the exercise of ordinary care, to have anticipated that, as a result of carrying out their order without warning to the plaintiff, injury might result to him, or others at work with him on the stairway? If the defendants ought to have anticipated such a result, they were guilty of negligence, although they could not have anticipated that injury would result in the form or way in which it did in fact happen. Christianson v. Chicago, St. P. M. & O. Ry. Co., 67 Minn. 94, 69 N. W. 640.

We are of the opinion that this question was one of fact for the jury. The question of the proximate cause of an injury is ordinarily one of fact, to be solved by the exercise of practical sense, rather than by the application of any abstract definition of the term. The question in this case was one of fact, for, upon the hypothesis that the defendants were negligent, the plaintiff's injuries resulted directly from an attempt to execute their negligent order. If the jury found such to be the case, then, as already stated, the negligence of the fellow servant in attempting to execute such order would be a concurring and contributing cause of the plaintiff's injuries.

Judgment affirmed.

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CHARLES E. OTIS v. CITY OF ST. PAUL.[1]

December 30, 1904.[2]

Nos. 14,075—(171).

Refunding Money Paid.

The right to a refundment of money paid by a purchaser at a sale under a judgment in special assessment proceedings conducted under the charter of the city of St. Paul is not contingent upon an action being brought to test the validity of such proceedings within three years from the date of the sale.

Same—Invalid Certificate of Sale.

If the certificate of sale and prior proceedings be adjudged invalid in any form of action, whether commenced before or after the limitation prescribed by the charter for bringing an action to test the validity of the same, the right of refundment exists.

Case Followed.

Willius v. City of St. Paul, 82 Minn. 273, to the effect that, in the absence of fraud or collusion, the city, though not a party thereto, is bound by a judgment declaring such proceedings invalid, followed.

Appeal by defendant from an order of the district court for Ramsey county, Bunn, J., overruling a demurrer to the complaint. Affirmed.

[1] NATIONAL BOND & SECURITY COMPANY v. CITY OF ST. PAUL.

December 30, 1904.

Nos. 14,076—(172).

Appeal by defendant from an order of the district court for Ramsey county, Bunn, J., overruling a demurrer to the complaint. Affirmed.

J. C. Michael and *G. R. O'Reilly*, for appellant.

William G. White, for respondent.

PER CURIAM.

The question in this case is identical with the one determined in Otis v. City of St. Paul. We therefore hold, following the case cited, that the order appealed from in this case must be affirmed.

Order affirmed.

[2] Reported in 101 N. W. 1066, 1134.

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J. C. Michael and *G. R. O'Reilly,* for appellant.
Ambrose Tighe, for respondent.

BROWN, J.

This action was brought to compel defendant to refund the amount paid the city for certain certificates of sale issued by it in proceedings for the enforcement of special assessments against property benefited by local improvements. Judgment for the amount of the special assessments was rendered in those proceedings, upon and pursuant to which a sale of the property benefited was had, and the proper certificates of sale issued; nineteen of which, covering the same property, came into the hands of plaintiff, as receiver of the Savings Bank of St. Paul. After the expiration of the period of redemption—five years from the date of the sale—plaintiff brought an action against the persons who owned the property when the assessment was made, claiming to be the owner thereof; in which, after trial in the district court of Ramsey county, the certificates so held by him were adjudged invalid for irregularities and defects in the proceedings leading up to and including the sale; whereupon plaintiff demanded, under the provisions of section 48, tit. 3, c. 6, of the city charter, that the city refund to him the amount paid for such certificates, with interest, which was refused. To the complaint, containing nineteen causes of action, and which sets out the facts fully, defendant interposed a general demurrer, which the trial court overruled, and the city appealed.

1. The principal question presented for our consideration is whether plaintiff's right of refundment is barred by the limitation contained in the provisions of the charter above referred to. The charter, so far as here pertinent, provides as follows:

> All deeds made to purchasers of lots and parcels of land sold for assessments, or the record thereof, shall in all cases be prima facie evidence that all requirements of the law, with respect to the sale, have been duly complied with, and of title in the grantee therein, after the time for the redemption has expired, and no sale shall be set aside or held invalid unless the party objecting to the same shall either prove that the court rendering the judgment, pursuant to which the sale was made, had not jurisdiction to render the judgment, or that after the judg-

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ment and before the sale such judgment had been satisfied, or that notice of sale as required by this act was not given, or that the piece or parcel of land was not offered at sale to the bidder who would pay the amount for which the piece or parcel was to be sold, nor unless the action in which the validity of the sale shall be called in question, be brought, or the defense alleging its invalidity be interposed within three years after the date of the sale, and if any sale shall be set aside by reason of any defect in the proceedings subsequent to the entry of the judgment, the court so setting aside the sale shall have power in such case to order a new sale to be made as nearly as may be in accordance with the provisions of this act. That in any action heretofore or hereafter commenced in which the validity of a deed or certificate of sale issued under this charter is brought into question, and the same shall be set aside on account of any irregularity or defect invalidating the sale pursuant to which said certificate or deed was issued, the party holding such deed or certificate of sale shall recover from the city of Saint Paul the amount paid by the purchaser at the sale, or by the assignee of the city on taking an assignment certificate, with interest at the rate of seven (7) per cent. per annum from the date of such payment. Such amount shall be paid out of the city treasury upon the order of the common council of said city. Such proceedings shall not operate as a payment or cancellation of any assessment included in the judgment, but the same shall stand as originally assessed against the property, and with all accruing interest, penalties and costs. All deeds referred to in this chapter shall be admitted to record without payment of taxes, and without the county auditor's certificate that the changes have been made.

The contention of the city is that, because the judgment and sale in the assessment proceedings, under which plaintiff's certificates were issued, were not adjudged invalid in some action involving their validity, brought within the time limited by the city charter above quoted —three years from the date of the sale—no right of refundment exists. This question was determined adversely to defendant's contention in the

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case of Fleming v. Roverud, 30 Minn. 273, 15 N. W. 119, in the case of State v. Murphy, 81 Minn. 254, 83 N. W. 991, and again in Willius v. City of St. Paul, 82 Minn. 273, 84 N. W. 1009.

In the first case cited the question as to the right of refundment arose under section 154, c. 11, G. S. 1866. That statute limited, as does the charter of the city of St. Paul, the time within which an action might be brought to determine the validity of a tax sale to three years from the date of the sale; but the following section provided further, as does the charter of St. Paul, that when the sale of any land was declared void by a court of competent jurisdiction, the amount paid by the purchaser at the tax sale should be refunded to him, with interest. The contention in that case, as it is here, was that the right of refundment depends upon the sale being declared invalid within the period fixed by the statute for bringing an action to test the validity of the same. But the court held otherwise, saying that it would do violence to the language of the statute to hold that the provision for refundment depended upon the result of an action to be commenced thereunder, and within the time thereby prescribed. The right to refundment was held to exist when a tax sale was set aside in any form of action, whether brought within the period fixed by the statute or subsequently. The action in which the validity of the tax proceedings in that case was involved was in fact brought long after the expiration of the time limited by the refundment statute. It was suggested in the opinion in that case that the limitation prescribed by the statute was intended to apply only to the owner of the land, or persons claiming under or through him.

In the case of State v. Murphy, supra, it appeared that in proceedings to enforce the payment of taxes delinquent for the year 1879 and prior years a tax judgment was rendered, and a sale of the land had thereunder in September, 1881. In May, 1897—more than fifteen years after the date of the sale—the owner of the land, in whose name it was assessed, brought an action to determine adverse claims thereto, in which the purchaser at the tax sale pleaded his tax title in defense. The action resulted in a judgment adjudging the tax proceedings invalid, whereupon, upon request of the holder of the tax title, the auditor refunded to him, under the provisions of the General Statutes, the amount paid at the sale, with interest, and immediately, by

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authority of the refundment statute, extended the amount thereof upon the records of his office as a tax against the land. In proceedings to enforce that tax the landowner interposed the defense that the refundment was unauthorized; that, as the tax proceedings were not adjudged invalid within fifteen years from the date of the sale—the time fixed by section 5134, G. S. 1894, for bringing actions for the recovery of real property—the right of refundment was barred. The limitation fixed by the refundment statute was not involved in that case, but the principle there applied is applicable to the case at bar. The court there said: "Nowhere in the statute do we find a suggestion that the holder of a tax title must bring an action to determine the validity of his title as a condition precedent to his right of refundment when his title is adjudged invalid. The tax certificate conveys to him the fee to the land covered thereby, and by statute (G. S. 1894, § 1593) such certificate is placed on the same footing as other deeds of real estate, and is prima facie evidence that all the requirements of the law with respect to the tax sale have been complied with. So long as his title remains unquestioned by the former owner, or other person claiming an interest therein, he is the absolute owner of the land, and no judgment confirming his title is at all necessary." The provisions of the charter of St. Paul are to the same effect. All deeds made to purchasers of land sold for special assessments are made prima facie evidence that all the requirements of the charter with respect to the sale have been duly complied with; and in other respects the charter provisions are substantially like those of the General Statutes on the same subject.

The provisions of the charter and of the General Statutes on this subject were incorporated therein for the benefit of those who purchase property at tax sales, and to secure them against loss of the money invested; a right of refundment being an assurance that, if they in fact receive no valid title from the city or state, as the case might be, by the purchase at the tax sale, they should, upon that fact being judicially determined by a competent court, receive a return of their money. In the case at bar, under the provisions of the charter governing sales of this kind, the owner of the property is given five years from the date of the sale to redeem therefrom, and it would be absurd to hold that the limitation of three years within

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which an action may be brought to test the validity of the sale should apply to the purchaser's right of refundment. He could not, with the mere certificate of purchase as the foundation of his action, which might be defeated at any moment by redemption, maintain an action to determine the validity of his title. He would have no title, and no standing in court in that sort of action, until his rights fully accrued; and even then, as suggested in the case of State v. Murphy, supra, there is no sound reason why he should be required to bring an action to determine the validity of a title which the law presumes valid in every respect.

In view of the purposes of the law and the previous decisions of the court, we find no difficulty in holding that in no proper light can the charter provisions be construed as making the right of refundment conditional upon the tax proceedings being adjudged invalid within three years, or in the particular form of action there authorized to be brought. That right must, to effectuate the purpose of the framers of the charter, viz., to reimburse persons who have advanced money to the city by the purchase of tax certificates, be held dependent only upon the sale being declared invalid in some form of action.

The case of Henningsen v. City of Stillwater, 81 Minn. 215, 83 N. W. 983, is not in point. The question as to the right of refundment was in no manner involved in that case. That was an action brought by the owner of land assessed for local improvements against the city to set aside the assessment proceedings on the ground that they were invalid, and was treated as an action brought under the provisions of the charter of the city of Stillwater, which are similar to those of the charter of St. Paul. The case of Willius v. City of St. Paul, 82 Minn. 273, 84 N. W. 1009, is directly in point, and in line with the cases of State v. Murphy and Fleming v. Roverud, supra. In the Willius case, which was an action involving solely the right of refundment, it was held that the right exists notwithstanding the fact that the judgment declaring the assessment proceedings there before the court invalid was rendered subsequent to the expiration of the three years fixed by the provisions of the charter for bringing such an action. See also section 576, Dunnell, Minn. Tax Law.

2. The judgment declaring the assessment proceedings in question in this action invalid was rendered in an action to which the city of

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St. Paul was not a party, and the point is made that the city is not bound thereby. This question was fully discussed and disposed of adversely to defendant in the case of Willius v. City of St. Paul, supra, and the rule laid down that the judgment in such cases is valid and binding against the city or state, in the absence of a showing that it was procured by mistake, fraud, or collusion. This rule was applied in Easton v. Scofield, 66 Minn. 425, 69 N. W. 326. The position of counsel for appellant on this phase of the case is not without force, but the question must be regarded as settled by the decision in the Willius case. No distinction can be made between a case arising under the charter of St. Paul and one arising under the General Statutes. They are in principle the same.

It is not improbable that a case of fraud and collusion might arise, and the holder of a tax title might, in a given case—as in State v. Norton, 59 Minn. 424, 61 N. W. 458—lose his right of refundment by laches. If the holder of a tax title should permit the person who owned the land at the time the taxes were assessed and at the time of sale to remain in possession thereof for a sufficient length of time to divest the title under the tax proceedings, or if the holder of the tax title should permit his rights to be cut out by a subsequent tax title, and then bring an action for the purpose of determining the validity of his title, procure a judgment adjudging it invalid, without calling the attention of the court to the fact that his rights had become lost by the adverse possession or subsequent tax title, the fraud would be quickly detected, and a refundment denied. Easton v. Scofield, supra. There would be no danger—for such cases are the only ones where fraud or collusion would be possible—of the city being mulcted by the fraud or collusion of the parties seeking a refundment. And again, where no subsequent tax title has intervened, the city loses nothing by the refundment, for the charter above quoted expressly provides that when the assessment proceedings are adjudged invalid the amount of the assessment, with accrued interest, penalties, and costs, may be again assessed against the property, and enforced in a new proceeding.

Our conclusions are in harmony with those reached by the learned trial court, and its order in the premises is affirmed.

Order affirmed.

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PETER GALLAGHER v. NORTHERN PACIFIC RAILWAY COMPANY.[1]

December 30, 1904.

Nos. 14,113—(144).

Contributory Negligence.

The trial court rightly instructed the jury in this, a personal injury action, to return a verdict for the defendant, for the reason that the plaintiff was, as a matter of law, guilty of contributory negligence.

Action in the district court for St. Louis county to recover $50,000 for personal injuries. The case was tried before Dibell, J., who, upon the close of the testimony, directed a verdict in favor of defendant. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

J. De La Motte and *W. E. Dodge,* for appellant.

Washburn, Bailey & Mitchell, for respondent.

START, C. J.

This is a personal injury case. The trial court, at the close of the evidence, directed a verdict for the defendant, and the plaintiff appealed from an order denying his motion for a new trial.

The only assignment of error argued in the brief of plaintiff is that the court erred in so directing a verdict. Assignments of error not specifically urged in the brief will not be considered. Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Firemen's Ins. Co., 62 Minn. 315, 64 N. W. 902. The evidence, taking the most favorable view of it for the plaintiff, shows these facts: The plaintiff is a man forty one years of age. His occupation was that of a contractor before he was injured. During the years 1900, 1901, and 1902 he had contracts with a lumber company to unload from the cars its logs as they were brought in by rail to the defendant's yards in the city of Duluth, and to bank them on the westerly shore of Rice's Point. The cars were not unloaded and returned as rapidly as the defendant desired, and to expedite the return of the cars, and for the convenience of the plaintiff, it was arranged

[1] Reported in 101 N. W. 942.

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between him and defendant's general yardmaster that the plaintiff might ride on the switch engines passing through the yards. The yardmaster told him that the proper way to flag the engines was to get in the center of the track, and waive them down with both hands, at the same time explaining to him the signal to be given. Thereafter, and until he had completed his contracts with the lumber company, the plaintiff, whenever he wished to ride on the engines, would step in the middle of the track, give the signal, and those in charge thereof would either stop and let him get on, or give him a signal to get off the track, and he would do so.

The plaintiff was injured May 27, 1902. On that day the rolling of the logs into the bay had been finished, and his contracts with the lumber company practically completed. The last car of logs, however, was unloaded a month before this time. At the time of his injury the plaintiff was on his way to the yard office to have a car set in the next morning to take away his tools and materials. He saw an engine and seven cars backing through the yard from Superior to Duluth. The engineer and fireman were facing from the plaintiff, but on the footboard of the engine there was a switchman, whose duty it was to look out for obstructions on the track, watch out for the switches, and get off and turn them when necessary, and give signals to the engineer. The plaintiff saw the engine some four hundred feet away, which was backing at the rate of four or five miles an hour. He stepped into the center of the track, facing the engine, and gave the usual signal to stop. The switchman on the footboard gave no signal of any kind either to the plaintiff or to the engineer, to the plaintiff's knowledge, nor did the engine slow down. The evidence will not justify a finding that the switchman in fact saw the plaintiff on the track at any time before the engine struck him, or a finding that the plaintiff was injured by the wanton or wilful negligence of the defendant; but it is sufficient to sustain a finding that if the switchman had been watching the track at the time he must have seen the plaintiff. The plaintiff could not see the engineer from where he stood on the track, and he could not have had any reason to suppose the engine would stop unless the switchman gave the signal to the engineer to do so. He stepped into the center of the track, facing the switchman, relying upon the stopping of the engine for him, as

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usual, until it was within two feet of him. What then happened, to use his own language, was this:

> I got on the track, and I flagged them down, and I got no signal to get off, and when the engine come up to me that I seen she was not going to stop, I didn't know what was the best to do. I looked for the side to jump out of the road, and she was so close on me that I didn't know what was best. I suppose I got mixed up or bothered a little bit, and I done what I thought was the best, made for the footboard—stepped for the footboard —thinking I would get up on the engine, and I catched the handrail—handhold—grabbed into it; and when I stepped, I stepped, I suppose, too quick for the footboard, and I just put a foot in front of the footboard, and the footboard struck my leg and it broke."

The ground was level on each side of the track, and there was nothing to prevent the plaintiff from stepping off the track to a place of safety before the engine was within two feet of him.

It is the contention of the plaintiff that he was not a trespasser nor a mere licensee on the premises of the defendant, but that he was there by its express invitation, and that it owed him the duty of active vigilance to prevent injury to him, which it failed to exercise, and that the question of his contributory negligence was one of fact; therefore the trial court erred in not submitting the case to the jury. On the other hand, the defendant claims that the plaintiff was at the time he was injured a trespasser, or at most a mere licensee, on its premises, and that it owed him no duty until it in fact discovered him in a position of peril; and, further, that as a matter of law he was guilty of contributory negligence.

Upon the undisputed evidence in this case we are so clearly satisfied that the plaintiff was, as a matter of law, guilty of contributory negligence, that we find it unnecessary to discuss or decide any other question. It is only in exceptional cases that the question of contributory negligence is one of law, but this case falls within the exception. The plaintiff was a mature man, in the possession of all of his faculties, familiar with the defendant's yard and the movements of its trains therein. He got upon the track, and watched the engine with

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seven cars backing toward him for some four hundred feet at the rate of four or five miles an hour. He saw that the switchman on the footboard did not give any signal to the engineer to stop. He knew that the engine was not slowing down. And yet he stands on the track until the engine was only twenty four inches from him. Then he attempted to board the moving engine. It was inexcusable negligence for him to wait until the engine was practically upon him before stepping to a place of safety. If, as his counsel claims, he was compelled to face an emergency when he attempted to board the moving engine, it was an emergency created by his own negligence in so remaining upon the track until it was too late to save himself. It follows that the trial court correctly instructed the jury to return a verdict for the defendant.

Order affirmed.

WILLIAM F. HUNT v. HENRY AHNEMANN and Others.[1]

December 30, 1904.

Nos. 14,126—(168).

Fraudulent Conveyance—Reservation.

Following Wetherill v. Canney, 62 Minn. 341, where a conveyance of real estate is made in good faith for the use of the grantee, and the reservation of a benefit to the grantor is incidental and partial, it is not void as to creditors, unless in fact made with intent to defraud them.

Same.

The rule applied in an action to set aside a deed, which was made in consideration of past services of the grantee to the grantor, coupled with his promise to share the crops with the grantor, and pay certain relatives part of the consideration therefor.

Special Verdict.

Held, upon the special verdicts of the jury, which were adopted by the trial court as its findings of fact, that the same support the conclusion of law that such conveyance was not fraudulent as to creditors.

[1] Reported in 102 N. W. 376.

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Appeal by plaintiff from an order of the district court for Goodhue county, Williston, J., denying a motion for a new trial, after a trial and findings in favor of defendants based upon a special verdict. Affirmed.

James E. Trask and *Chas. H. Taylor,* for appellant.

J. C. McClure and *O. M. Hall,* for respondents.

DOUGLAS, J.

This action was brought to set aside a contract of sale and deed executed by Henry Ahnemann to his son Rudolph, involving a half section of land situated in Goodhue county, and to subject the same to the lien of a judgment for $22,072.75 in favor of plaintiff and against said Henry Ahnemann, recovered in 1903 upon his liability as the owner of capital stock in the Allemannia Bank.

It appears the Allemannia Bank became insolvent, and was placed in the hands of plaintiff, as receiver, on January 4, 1897. Said contract was made two years prior thereto, but the deed referred to, which was given pursuant to the terms thereof, was executed subsequent to such insolvency, to wit, March 13, 1897. Rudolph Ahnemann was then thirty seven years of age, and since his majority has continuously lived with his father, and assisted in the management of said farm. The father thereby agreed to convey said land to Rudolph in consideration of the delivery to him from year to year, during his life, of half the crops raised thereon, and also in consideration of the agreement of said grantee to pay certain sums of money to other children of the grantor upon the latter's death. It is not claimed that Henry Ahnemann was insolvent in 1895 or prior thereto; but in 1897 he was not, aside from said farm, the owner of property of sufficient value to discharge his statutory liability as such stockholder. It appears incidentally that such other property, of the value approximately of $7,000, and a like amount received by Henry Ahnemann from his son Rudolph upon said contract, has been taken under legal process and applied upon the judgment.

Against plaintiff's objection, the trial court submitted five controverted questions of fact to the jury, which were answered either "Yes" or "No," in the form of a special verdict, and adopted such verdict as its findings of fact, as follows:

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First. That the defendant Henry Ahnemann at the time of the commencement of this action was not the owner of the lands described in the complaint, or any part thereof.

Second. That the defendant Henry Ahnemann at the time of the commencement of this action was not in the possession of the lands described in the complaint herein, except the eighty acres thereof held by him as his homestead.

Third. That said defendant Henry Ahnemann was at the time of the commencement of said action in possession of said eighty acres of said land as his homestead.

Fourth. That said defendant Henry Ahnemann did not, on or about June 3, 1897, or at any other time before or since said day, for the purpose of evading or avoiding the payment of any debt or liability of himself to said Allemannia Bank of St. Paul, or to said plaintiff as its receiver, or any of its creditors, or for the purpose or with the intent to hinder, prevent, or delay said bank or said receiver, or said creditors, or either of them, from collecting any debt or liability due or owing by him to said bank, receiver, or creditors, or either of them, make or deliver to said defendant Rudolph Ahnemann a contract of sale of said lands, or any part thereof, described in the complaint herein, or the deed of conveyance of said lands to said Rudolph Ahnemann.

Fifth. That the contract of sale and deed in said complaint mentioned were not, nor either of them, made by said Henry Ahnemann to said Rudolph Ahnemann without any consideration therefor.

—and thereupon found, as a conclusion of law, that plaintiff was not entitled to the relief prayed for, and directed judgment accordingly. From an order overruling plaintiff's motion to set aside the special verdict of the jury, and denying him a new trial, plaintiff appeals.

In Berkey v. Judd, 14 Minn. 300 (394), it was held that the legislature, by section 199, c. 66, G. S. 1866 (G. S. 1894, § 5361), authorized the submission to a jury of the whole issue in equitable actions. In so holding, the court said: "But this authority should only be exercised where the whole issue is such as to make a proper case for a

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jury trial. It does not change the rule as to what are proper issues for that mode of trial."

In Pint v. Bauer, 31 Minn. 4, 16 N. W. 425, the court, having under consideration an equitable action in which the whole issue was submitted, used the following language: "A special verdict must find all the facts which are requisite to enable the court to say, upon the pleadings and verdict, without looking into the evidence, which party is entitled to judgment, and such facts should be found so clearly and unequivocally as not to leave them to be made out by argument or inference."

In Stensgaard v. St. Paul Real Estate Title Ins. Co., 50 Minn. 429, 52 N. W. 910, it was held that the submission of such issues to a jury was largely discretionary with the trial court.

Applying the principles established in the above cases, we are of the opinion the trial court did not err in submitting the various questions to the jury for determination. Each involved a controverted question of fact, and, while the first question is extremely broad, still, when weighed in the light of the others submitted for a special finding, we do not consider the court violated a reasonable discretion in inviting a special finding thereon.

We are also of the opinion the special verdicts rendered were sufficiently broad and explicit to enable the court to say, upon the facts so found and the pleadings, which party was entitled to a judgment, without looking into the evidence. It does not appear that the deed from Henry Ahnemann to his son was for the principal or exclusive benefit of the grantor, or that it was voluntary. It is true, as shown by the pleadings, the instrument was executed after the indebtedness to the plaintiff arose, and at a time when the grantor was insolvent; but it was based upon, and made in compliance with, the terms of a valid written contract entered into with his son two years prior thereto, at a time when he was solvent, and before such stockholder's liability accrued. This written contract to convey the land in question to his son was based upon, and in fact represented in a more formal way, an agreement made between the parties sixteen years prior thereto, by which the father agreed to transfer such land to his son. The jury having found that said deed and written contract were not executed or delivered by Henry Ahnemann without consideration, or for the

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purpose or with an intent to hinder, prevent, or delay said bank or receiver, or either of them, from collecting any debt or liability due or owing by him to said bank or receiver, and that Henry Ahnemann was not the owner of the land in controversy, and not in possession of any part of said land not exempt from execution at the time of the beginning of this action, we are of the opinion such findings negatived every material allegation of the complaint, and that the court was justified in adopting the same as its findings of fact, and in directing judgment thereon.

It fairly appears that the conveyances were for the use and benefit of the grantee, based upon a valid consideration, and the reservation of a benefit to the grantor was incidental and partial. It also appearing they were not made with an intent to defraud creditors, it follows under the doctrine established in Wetherill v. Canney, 62 Minn. 341, 64 N. W. 818, that said contract and deed were not void as against plaintiff. McCord v. Knowlton, 79 Minn. 299, 82 N. W. 589, is clearly distinguishable. In that case the conveyances under consideration were contemporaneous. The deed was a voluntary conveyance to the daughter, ostensibly in consideration of services rendered, but in the absence of a prior agreement or understanding that she should receive compensation therefor.

In view of the fact that the issues were tried upon the assumption by both parties that the sole consideration entering into the transaction consisted of services of Rudolph theretofore rendered, and an agreement to be performed by him in the future, the instruction of the jury to the effect that they had a right to take into consideration the fact that the contract and deed recited a valuable consideration was not prejudicial.

We are of the opinion the record in other particulars is free from reversible error; that the special verdicts of the jury were sustained by the evidence; also that the findings of the court based thereon justify the conclusions of law adopted.

Order affirmed.

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PHILIP C. JUSTUS v. BOARD OF COUNTY COMMISSIONERS OF RAMSEY COUNTY.[1]

December 30, 1904.

Nos. 14,127—(155).

Sheriff's Fee.

A sheriff is not entitled to a fee of one dollar from his county for each execution issued upon a personal property tax judgment delivered to him and returned by him unsatisfied.

Appeal by plaintiff from an order of the district court for Ramsey county, Olin B. Lewis, J., sustaining a general demurrer to the complaint. Affirmed.

Reese & Zollman, for appellant.

Thomas R. Kane and *O. H. O'Neill,* for respondent.

START, C. J.

This is an appeal by the plaintiff from an order of the district court of the county of Ramsey sustaining a general demurrer to his complaint, which alleged a claim of $1,002 against the defendant for the fees of the plaintiff, as sheriff, in returning unsatisfied one thousand two executions issued on personal property tax judgments.

The question presented by the record for our decision is this: Is the sheriff entitled to a fee of one dollar from his county for each execution issued upon a personal property tax judgment delivered to him and returned by him unsatisfied? We answer the question in the negative. A public officer takes his office with all its burdens, and he is not entitled to any compensation for services rendered to the public unless the statute expressly authorizes it.

It is, however, the contention of the plaintiff that the statute (G. S. 1894, §§ 5550, 5553) expressly provides compensation for services of the kind here in question. It is true that this statute provides that sheriffs shall be entitled to a fee of one dollar for diligent search and inquiry, and returning an execution unsatisfied when no property can

[1] Reported in 101 N. W. 943.

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be found. And if this provision applies to an execution on a personal property tax judgment, the plaintiff's contention would be correct.

But the enforcement of personal property taxes is a special proceeding, controlled by the statutes establishing it, and the legislature has provided a course of procedure in tax cases complete in itself. Thus section 1570, G. S. 1894, provides for the fees of the clerk of the district court in cases not contested, and in contested cases such fees as are allowed in civil actions. Section 1574, provides that the sheriff or his deputy shall be allowed the same fees for collecting taxes, and for making distress and sale of goods and chattels for the payment of taxes, as are allowed by law to constables for making levy and sale of property on execution. It is to be noted that the statute gives the fee only in case the sheriff collects something on the tax from which it can be paid, and, further, that there is no provision giving the sheriff, in any contingency, such fees as are allowed in civil actions, as provided in the case of the clerk. The plaintiff contends that section 1574 refers only to the collection of delinquent personal property taxes upon tax warrants, not to collections on tax executions. We are, however, of the opinion that this section refers to taxes collected on either a warrant or execution. Section 1570 provides for issuing executions on personal property tax judgments, and that no property shall be exempt from seizure by virtue thereof. This implies that the executions are to be delivered to the proper officer—the sheriff—for collection.

In Schmid v. County of Brown, 44 Minn. 67, 46 N. W. 145, it was held that a sheriff was entitled, by virtue of section 1574, to fees for an unsuccessful attempt to collect a tax warrant; that is, for returning it unsatisfied. The logic of the case cited would sustain the plaintiff's contention in this case, for there is no essential difference between a tax warrant and a tax execution as to sheriff's fees. The case, however, was expressly overruled by the case of Chapel v. Board of Commrs. of Ramsey Co., 71 Minn. 18, 73 N. W. 520, wherein it was held that a sheriff was not entitled to fees from the county for returning tax warrants unsatisfied.

In Wagener v. Board of Commrs. of Ramsey Co., 76 Minn. 368, 79 N. W. 166, it was held that the sheriff was not entitled to fees from the county for returning tax citations not served for the reason that the per-

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son therein named could not be found after diligent search. Counsel for the plaintiff calls our attention to a statement in the opinion in the Wagener case to the effect that: The statute (G. S. 1894, § 5553) provides that the sheriff shall receive, as compensation, "for diligent search and inquiry and returning summons when parties cannot be found, one dollar, without regard to number of defendants, and returning execution when no property can be found, one dollar. But this is not the kind of service charged for. The items are for attempted service of subpœnas, writs of attachment, orders to show cause, and personal property tax citations, when the person sought was not in fact found." The inference which counsel draws from this statement is that, if the services in that case had been for returning tax executions unsatisfied, no property having been found, the county would have been liable for such services. Whatever may be inferred from the statement, it is here immaterial, for no such question as suggested was before the court in the Wagener case. The case at bar cannot be distinguished from the Chapel case, and we hold that the plaintiff is not entitled to recover from the county for the services here in question.

Order affirmed.

ANN CODY v. DULUTH STREET RAILWAY COMPANY and Another.[1]

December 30, 1904.

Nos. 14,167—(187).

Charge to Jury.

In the trial of an action based upon the alleged negligence of defendant in suddenly starting its car while it was standing still at a crossing, and thereby throwing plaintiff to the ground, it was asserted by defendant and denied by plaintiff that the latter jumped from a rapidly moving car at a considerable distance from the place of the alleged injury. *Held*, the trial court erred in charging the jury that, if they believed the plaintiff stepped or jumped off the car while in motion, they could consider the question whether a person, in the exercise of or-

[1] Reported in 102 N. W. 201, 397.

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dinary care and prudence, under the same circumstances, would have jumped or stepped off. Such an issue was not tendered by the pleadings or litigated in the presentation of the case.

On Reargument, February 3, 1905.

Request to Charge Jury.

In an action against a street railway for injuries to a passenger, a request to charge that, if plaintiff jumped or stepped off the car while in motion, she could not recover, was properly refused, because it was indefinite as to the speed of the car on which the question of negligence in stepping therefrom would depend.

Negligence—Contributory Negligence.

A complaint charged negligence in that the car, having stopped to permit plaintiff to alight, was suddenly started, and plaintiff was thrown to the ground. Defendant attempted to show that plaintiff was guilty of contributory negligence in alighting before the car had come to a stop. The court, in its charge, defined the general duties of defendant as a common carrier, defined contributory negligence, and then stated that there were two controlling issues in the case: First, was defendant negligent, and were the injuries proximately caused by such negligence? Second, was plaintiff negligent, and did her negligence proximately cause or contribute to her injury? After charging on the first phase of the case, the court stated that with reference to plaintiff's negligence the jury should consider where the car was when plaintiff arose from her seat, whether it was moving, and, if so, at what speed, and then continued that, if plaintiff got off the moving car, the question whether or not a person of ordinary care would have jumped off the steps of the car under the same circumstances under which plaintiff was placed was a question of fact for the jury. *Held*, that the concluding clause of the charge did not, when considered with the entire charge, and especially with that portion directed to contributory negligence, inject a question not litigated into the case, and was not necessarily misleading.

Duty of Counsel.

Where a charge is otherwise clear and distinct on the issues submitted at the trial, language susceptible of a construction in conflict therewith must be called to the attention of the court by counsel if he deems it misleading.

Action in the district court for St. Louis county to recover $10,050 for personal injuries. The case was tried before Ensign, J., and a jury, which rendered a verdict in favor of plaintiff for $4,500. From an order

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denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed on rehearing.

Thos. S. Wood, for appellant.

John Jenswold, Jr., for respondent.

DOUGLAS, J.

This action was brought to recover damages for an injury received from being thrown from a street car, and was based upon the negligence of defendant in suddenly starting its car after it had stopped, at a time when plaintiff, a passenger, was about to alight therefrom.

Evidence was offered by the plaintiff tending to establish a prima facie case of negligence against the defendant, and that a serious injury resulted. On the other hand, evidence was offered on behalf of defendant tending to show that the injury to plaintiff occurred at a point midway in the block after the car left the street crossing where it was accustomed to stop, and where plaintiff claimed she was injured; also that such injury was caused by the negligence of the plaintiff in hurrying to the end of the car and voluntarily stepping or jumping off while it was moving rapidly. This was emphatically denied by plaintiff.

The questions of fact presented under the issue tendered by the plaintiff were fully and fairly submitted to the jury, but, after charging in detail as to the law applicable upon the question of possible contributory negligence of the plaintiff, the court, as an incident thereto, charged the jury, in substance, that, if she stepped or jumped off the moving car, they could consider the further question whether a person in the exercise of ordinary care and prudence, under the same circumstances under which she was placed, would have jumped or stepped off.

While it has been repeatedly held by this court that the question whether a person is free from contributory negligence in stepping off from a moving car is generally one of fact for the jury, depending upon a variety of circumstances (Piper v. Minneapolis St. Ry. Co., 52 Minn. 269, 53 N. W. 1060; Gaffney v. St. Paul City Ry. Co., 81 Minn. 459, 461, 84 N. W. 304; as applied to horse cars, Schacherl v. St. Paul C. Ry. Co., 42 Minn. 42, 43 N. W. 837), still that question was not at issue in the case at bar, and, in our opinion, the trial court erred in submitting it. Plaintiff did not justify her act in leaving the car while in motion, or charge defendant with any act of negligence directly or indirectly involv-

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ing it; but, on the other hand, emphatically denied that she either started to leave the car or stepped off under such circumstances. She testified that she left her seat after the car stopped at the crossing, and while standing in the vestibule, and about to alight, the car was started suddenly, and she was thereby thrown to the ground. Therefore submitting the question of fact to the jury for determination whether she acted prudently or cautiously in stepping or jumping off at a time when the evidence tended to show the car was running at a high rate of speed not only confused the issue presented, but might be treated by the jury as charging inferentially that it was their duty to find for the plaintiff, regardless of the negligence charged, if the evidence disclosed that she suffered injury in alighting from the car while in motion; provided they further found that in doing so she used such care and caution as a person of ordinary prudence would have used under the same circumstances.

In Morrow v. St. Paul City Ry. Co., 65 Minn. 382, 67 N. W. 1002, it was held that the trial court erred in submitting to the jury the question whether defendant furnished the plaintiff's intestate a safe place in which to work, for the reason that such question was not one of the issues tendered by the pleadings. We are of the opinion this case falls within the principle therein declared. The plaintiff was entitled to recover, if at all, only for an injury arising from or caused by the negligence of defendant alleged in the complaint.

Order reversed and new trial granted.

This case having been reargued the following opinion was filed on February 3, 1905.

PER CURIAM.

A re-examination of this case upon reargument convinces us that the court misapprehended the force and effect of the instruction which was the basis of reversal in the decision heretofore filed.

The specific ground of negligence charged in the complaint was that the car upon which plaintiff was riding stopped for the purpose of allowing plaintiff to get off, and while she was in the act of going down the steps defendant negligently and suddenly started the car with a jerk, thereby throwing plaintiff to the ground. Defendant attempted to prove that plaintiff stepped off the car before it had come to a stop, and was thus guilty of contributory negligence. This line of defense is shown

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clearly by the cross-examination of plaintiff and by the testimony of several witnesses called on the part of defendant. Defendant excepted to the following language, used by the court in the course of the charge to the jury:

> If the car was moving when plaintiff left her seat, and went down on the step of the car, whether or not she was advised not to go off, and, if she did get off the moving car, whether or not a person of ordinary care and prudence, under the same circumstances under which she was placed, would have jumped or stepped off the step of the car, these are all questions of fact for you, the jury, to determine, and I invite your attention to the evidence, and all the evidence in the determination of these questions.

The previous decision was based upon the ground that the effect of this part of the instructions was to inject a new issue in the case, not presented by the pleadings, and not litigated at the trial, and in effect left the jury to infer that they might find a verdict for plaintiff, although the car was in motion at the time she attempted to alight, provided she used ordinary care in so doing. The court fell into error in this respect by failing to consider the nature of the evidence bearing upon the question of contributory negligence, and in not sufficiently comprehending the general charge of the court upon that question.

From a re-examination of the record it clearly appears that plaintiff did not assume an inconsistent attitude at the trial, or attempt to recover upon any other ground than the one set forth in the complaint; but the defense of contributory negligence was vigorously interposed, and made a very prominent issue in the case. It was proper, therefore, for the court to set before the jury the issues which had been presented at the trial, and the question was thus set forth in the first part of the general charge:

> And the question arising from these allegations of the complaint, which the jury must determine from the evidence in the case, is, did the defendants so negligently and carelessly start their car with a jerk that the plaintiff was thrown from said step onto the ground, whereby she received the injuries complained of?

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The court then set out in detail the duties of defendant as a common carrier, for hire, of passengers; the management and control of its cars; the duty to stop a sufficient length of time to permit passengers to get on and off; and then stated that defendant claimed plaintiff was injured by her own negligence, and, if plaintiff's negligence contributed to her injuries, then she could not recover. The court then defined contributory negligence as applicable to plaintiff in this case, and in recapitulating this question said there were two controlling questions for the jury: First. Was defendant negligent, as charged in the complaint, and were plaintiff's injuries proximately caused by such negligence? Second. Was plaintiff negligent, and did her negligence proximately cause or contribute to her injuries? The court further stated that the jury should consider the respective claims of the parties in the light of the evidence, and in considering the first question to determine whether, in the exercise of due care, defendant, after stopping at the crossing, and after plaintiff was on the steps of the car, allowed her a reasonable time to alight, and, if not, then it was guilty of negligence. But, on the other hand, in relation to the second question:

> Was the plaintiff negligent, and did her negligence proximately cause or contribute to the injury she received, and of which she complains? It is your duty to consider and determine from the evidence where the car was when the plaintiff arose from her seat in the car; whether or not it was then moving; if so, at what speed it was moving; whether it was moving when the plaintiff entered the vestibule and went down upon the car step; the speed at which the car was moving, as the evidence discloses it.

Following this quotation appears that portion of the charge previously set out, and which was excepted to by appellant.

Defendant requested the court to instruct the jury that, if plaintiff jumped or stepped off the car while in motion, she could not recover. This particular request was properly refused, because indefinite as to the speed of the car. Negligence on her part would depend on the speed at which the car was going. But it was proper for the court to submit to the jury the question of contributory negligence, defendant having tried the case upon that line of defense. While that portion of the charge excepted to, when considered by itself, would seem to inject into

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the case a question not litigated, yet, when considered with the entire charge, and especially with that portion directed to contributory negligence, it is not necessarily misleading, and is not fairly open to the objection made to it. The court, by using this language, is not addressing the jury upon the question of defendant's negligence, but is speaking wholly upon the question of plaintiff's negligence; and defendant had introduced testimony tending to show that the car was moving when plaintiff left her seat and went on the steps, and that she was advised not to get off, but did get off, when the car was moving. It is true the court made the statement that it was a question of fact as to whether plaintiff exercised ordinary care and prudence while getting off the car when in motion; yet, when considered in connection with the proposition then being submitted to the jury, it cannot reasonably be held that it had the effect of confusing and diverting the minds of the jurors from the real question submitted.

We think this part of the language excepted to comes within the rule that, if the charge is otherwise clear and distinct on the issues submitted at the trial, language susceptible of a construction in conflict therewith requires counsel to call the attention of the court thereto if it is deemed to be misleading. It is apparent, when considered in connection with the context, that the language referred to was not used for the purpose of denying the propositions of law then under consideration, and was not error.

We find no other error in the case, and, for the reasons stated, the former order of the court is revoked, and the order appealed from is affirmed.

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STATE ex rel. JOHN HOWIE v. COMMON COUNCIL OF CITY OF NORTHFIELD.[1]

December 30, 1904.

Nos. 14,219—(160).

Intoxicating Liquor.

The question whether a license for the sale of intoxicating liquors shall be granted to an applicant therefor within the city of Northfield rests in the sound judgment and discretion of the common council, in the exercise of which they act judicially, and not ministerially, and their action cannot be controlled or reviewed by mandamus.

Saloon License.

The council may, if in its judgment the best interests of the inhabitants of the city demand it, limit the number of saloon licenses to be granted.

Alternative writ of mandamus issued from the district court for Rice county, upon relation of John Howie, commanding respondent to issue to relator a license to sell intoxicating liquor within the city of Northfield, or to show cause to the contrary. From an order, Buckham, J., overruling a general demurrer to the answer, relator appealed. Affirmed.

F. M. Wilson and *A. B. Childress,* for appellant.

Article 1, section 2, of the constitution of this state provides: "No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or judgment of his peers." The common council is not granted the power, expressly or impliedly, to limit the number of persons to whom it will issue, upon proper application, liquor licenses; it is simply granted the right "to restrain, control and regulate," and this power can never be extended to include prohibition. It cannot reject arbitrarily a person worthy to receive such a license and grant the favor to another without violating the foregoing constitutional

[1] Reported in 101 N. W. 1063.

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provision. Licensing authorities in passing on an application for license can exercise only a legal discretion, and have not a right to exercise arbitrary and capricious discretionary power regarding such application. Relators are entitled to a writ of mandamus to correct an abuse of arbitrary exercise of authority. State v. City of Alliance, 65 Neb. 524; Ex Parte Levy, 43 Ark. 42; Zanone v. Mound City, 103 Ill. 552; s. c. 11 Ill. App. 334; Amperse v. Common Council, 59 Mich. 78; Brock v. State, 65 Ga. 43; 11 Am. & Eng. Enc. (1st Ed.) 641–651, and 663; Black, Intox. Liq. § 170, et seq.; Freund, Pol. Powers, § 209; Yick Wo v. Hopkins, 118 U. S. 356; Sherlock v. Stuart, 96 Mich. 193; Ex Parte Theisen, 30 Fla. 529.

Municipal authorities may be required by mandamus to issue a license to sell liquors to one who is entitled thereto when they have arbitrarily and capriciously refused such license. High, Extra. Leg. Rem. (3d Ed.) § 327; Merrill, Mand. § 40; 2 Bailey, Jur. § 770; McLeod v. Scott, 21 Ore. 94.

The common council have not the power arbitrarily to determine that they will grant only five liquor licenses and to discriminate against the relator, for they have no charter power so to do. The only power granted is confined to the prescription of conditions. Horr & Bemis Mun. Pol. Ord. § 263; In re Barclay, 12 U. C. Q B. 86; In re Breystock, 12 U. C. Q. B. 458; In re Brodie, 38 U. C. Q. B. 580.

Joseph Donaldson, for respondent.

BROWN, J.

The facts in this case are as follows: The city of Northfield is a municipal corporation, created and existing under the provisions of chapter 17, p. 95, Sp. Laws 1875, and subsequent amendatory acts, with a population of about three thousand. Relator on June 14, 1904, filed with the city recorder an application for a license to sell intoxicating liquors within the city, with which was a bond in the penal sum of $2,000, in the form and conditioned as required in such cases by the ordinances of the city. He also paid to the city treasurer the sum of $1,200, the license fee fixed by the council for all licenses issued to applicants for the sale of intoxicating liquors. The application

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was in all respects in due form; notice of hearing thereon was given by the council, as required by law; but on July 1, the time fixed for such hearing, the council refused to grant the license. No objections were made to relator on account of his character, and, for all that appeared, he was a fit and suitable person to whom a license might be granted. Upon these facts an alternative writ of mandamus was issued, requiring respondent to show cause why a license should not be issued to relator, to which respondent answered, setting up, among other things, after admitting substantially all the allegations of the writ, that the council, in refusing the license to relator, did so in the exercise of its discretion, as it had the right to do, and in accordance with the previous determination of the council to limit the number of saloons in the city to five; that prior to the consideration of relator's application five other applications had been considered and granted; and the reason for rejecting relator's application was that the council deemed it for the best interests of the people that there be no more than five licensed saloons in the city. To this answer relator demurred on the ground that the facts stated therein did not constitute a defense. The demurrer was overruled, and relator appealed.

By the act incorporating the city of Northfield the common council thereof was vested with full power

> To restrain, control and regulate the selling and disposing of spirituous, vinous, malt, fermented, or any intoxicating liquors within the said city, and may enforce the same by appropriate ordinances.

Under the authority thus conferred, the common council of the city passed an ordinance entitled "An ordinance to regulate and restrain the traffic in intoxicating liquors." The first section provides that no person or persons shall sell, give away, or dispose of any intoxicating liquors within the limits of the city without first obtaining a license therefor. The second section provides that every person who shall apply to the common council for a license to sell intoxicating liquors, and whose application shall be approved by the council, shall be entitled to receive the same subject to the conditions and restrictions

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named and specified in other sections of the ordinance. It is contended by relator that a proper interpretation of the charter and ordinance under consideration entitles an applicant, as a matter of right, upon compliance with their provisions, to have a license for the sale of intoxicating liquors issued to him; and that, as the application in the case at bar was in all things in conformity with the requirements of the ordinance, a writ of mandamus should issue commanding the city council to issue the same.

It is contended that the council has no right arbitrarily to limit the number of saloons to be licensed; that, if it determines to grant licenses at all, it must grant them to all applicants who bring themselves within the provisions of the law. We do not concur in this contention. The provisions of the charter vest in the common council authority to regulate and control the sale of intoxicating liquors within the city, and in exercising that authority the council is clothed with discretionary powers, the exercise of which cannot be controlled by the courts. The power to regulate and control includes the power to do all that is deemed, in the judgment of the council, for the best interests of the municipality and its inhabitants. It necessarily confers the power to refuse a license, or to limit the number of licenses to be granted, when, in the judgment of the council, the welfare of the city suggests such action.

As remarked by Judge Flandrau in City of St. Paul v. Troyar, 3 Minn. 200 (291), a case involving the construction of charter provisions and an ordinance similar to those in the case at bar, unless the power to refuse is thus conferred, there would be no control or regulation, because, if the authorities were required to license every applicant who complied with a prescribed set of conditions, the authority would be changed from one of regulation and control to one of taxation—"from a power, the judicious exercise of which is essential to the very life of a city, into one entirely at the mercy of the individual citizen. * * * When we speak of a discretion in the city authorities in the exercise of a power, we mean, of course, a legal discretion, and not an arbitrary and uncontrollable sway. From the peculiarly democratic character of our municipal institutions, such powers cannot become dangerous in the hands of our rulers, except,

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perhaps, in the granting of such licenses with too much liberality. We have never heard any complaints concerning the scarcity of such institutions."

The principle applied in that case is in harmony with the great weight of authority. Black, Intox. Liq. § 171, et seq.; Muller v. Commissioners, 89 N. C. 171; Batters v. Dunning, 49 Conn. 479; Ex parte Whittington, 34 Ark. 394. It was followed in State v. Board Commrs. of Carver County, 60 Minn. 510, 62 N. W. 1135, though the precise question was not there before the court. It was there said that the question whether a license to sell intoxicating liquors should be granted or refused in any case rests in the discretion of the board of county commissioners, in the exercise of which they act judicially, and not ministerially, and their action cannot be controlled or reviewed by mandamus. That was a case where the application was presented to the board of county commissioners, but the principle followed is applicable to the case at bar, the power vested in the county commissioners being similar to that granted to the city of Northfield. In this case the answer alleged that the city council, in the consideration of relator's application, exercised its judgment and discretion, and refused it because the best interests of the city required its refusal. This, within the authorities cited, the council had the right to do, and its conclusion cannot be controlled by mandamus. Black, Intox. Liq. § 172.

The further point made by relator that, under section 2 of the ordinance above quoted, he was entitled to a license as a matter of right, is not well taken. The section provides that every person who shall apply to the common council for a license to deal in intoxicating liquors, and whose "application shall be approved by the council," shall be entitled to receive such license. It is urged that the language, "shall be entitled to receive such license" makes it mandatory upon the council to issue all licenses where the applicants comply with all the preliminary conditions prescribed by the ordinance. This language, however, applies only to an applicant whose application "shall be approved," and whether any particular application shall be approved rests in the sound judgment and discretion of the council. If one be approved, and the recorder or mayor of the city should refuse to

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issue the license, mandamus would lie to compel those officers to perform their duty and issue it; but mandamus will not lie to compel the approval of an application, where, as in this case, the granting or refusing of the same involves an exercise of judgment and discretion on the part of the council.

Order affirmed.

DANIEL A. WEBSTER and Another v. P. FERGUSON.[1]

January 6, 1905.

Nos. 14,118—(112).

Insurance Agent.

An insurance agent, within the intent of section 87, c. 175, p. 437, Laws 1895, is one who assumes to act for or on behalf of any company not authorized to do business in this state, and it is not essential that he be appointed as the representative of such companies, or that he be the authorized agent of a duly licensed company.

Liability of Agent.

But a party is not liable upon the contract in respect to which he assumed to act, by request, unless the insured was deceived by his conduct, having reasonable grounds for believing that the companies involved in the transaction were duly authorized by the state.

Same.

Held, under the circumstances of this case, there was no liability on the part of defendant.

Three separate actions were commenced by plaintiffs in the district court for Houston county against defendant Ferguson. In the first action Security Fire & Marine Assurance Company was joined as defendant; in the second, American Trust & Insurance Company; and in the third, Commonwealth Savings & Insurance Company. The actions were brought to recover in the aggregate $4,000 upon policies of fire insurance issued by defendant companies through the alleged agency of defendant Ferguson. Jurisdiction of defendant companies

[1] Reported in 102 N. W. 213.

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was not obtained, and the actions against defendant Ferguson to enforce the personal liability created by section 87, chapter 175, Laws 1895, were consolidated and tried together before Kingsley, J. Upon conclusion of plaintiffs' testimony the court granted a motion to dismiss the action and from an order denying a motion for a new trial, plaintiffs appealed. Affirmed.

Duxbury & Duxbury, for appellants.

Assuming that the term "an insurance agent," as used in section 87, chapter 175, Laws 1895, refers to the agent of the unauthorized company issuing the policy, whether acting as an insurance agent under the insurance act or not, we contend that the act provides who shall be considered agents of such companies, and that the evidence shows defendant Ferguson to be such agent within the provision of the act itself, and that in order to establish the liability of such agent it is not necessary to establish his agency by the common-law rules of agency. For the statutory definition of "insurance agent" in other jurisdictions and the judicial construction thereof, see—Iowa: Laws 1880, c. 211, § 1; Code, §§ 1749, 1750; St. Paul v. Shaver, 76 Iowa, 282. Alabama: Code 1886, § 1205. Wisconsin: R. S. 1878, § 1977; Welch v. Fire Association, 120 Wis. 456, and cases cited; Schomer v. Hekla, 50 Wis. 575, and other cases cited under section 1977, supra. Illinois: Continental v. Ruckman, 127 Ill. 364. Texas: Sayles, An. St. art. 2943a. See also cases cited by appellee in McBride v. Rinard, 172 Pa. St. 546.

If it is necessary to show that defendant Ferguson was the agent of the companies on whose policies he is held to be liable within the meaning of section 87, the evidence in this case was certainly sufficient. Such facts have been held to show a party to be the agent of the company issuing the policy independent of any statute. Sias v. Roger Williams Ins. Co. (C. C.) 8 Fed. 183; Indiana v. Hartwell, 123 Ind. 177.

J. C. Raymond and *E. C. Raymond,* for respondent.

Defendant Ferguson was not the agent of the insurance companies in procuring the insurance. An agency is created by a contract either expressed or implied. To constitute an implied agency it must be

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recognized as such by the parties. A mere insurance broker cannot be converted into an agent of the insurance company without some evidence of some action on the part of the company or from facts from which a general authority might be inferred. Fromherz v. Yankton, 7 S. Dak. 187; Gude v. Exchange Fire Ins. Co., 53 Minn. 220; John R. Davis Lumber Co. v. Hartford, 95 Wis. 226; Rahr v. Manchester, 93 Wis. 355; State v. Johnson, 43 Minn. 350.

LEWIS, J.

The object of this action is to recover from defendant Ferguson the amount of loss from fire under certain insurance policies issued by the defendant companies, which were not authorized to do business in this state.

Ferguson conducted a store at La Crescent in this state, and was local special agent of the Phœnix Insurance Company of Hartford. Plaintiffs owned a water-power mill in the vicinity, and applied to him for insurance upon it. The Phœnix Company having declined the risk, negotiations followed for insurance in other companies, which resulted in plaintiffs' taking out $4,000 insurance in defendant companies. The action against Ferguson is based upon the claim that he was an insurance agent at La Crescent, and that as such he obtained the policies for plaintiffs, and is personally liable for the loss, under section 87, c. 175, p. 437, Laws 1895. The defense was that Ferguson was not the agent of the companies accepting the risk within the meaning of the statute. At the close of plaintiffs' case, upon motion of defendant Ferguson the court dismissed the action.

We find no error in any of the rulings assigned, and this discussion will be limited to the question whether, under the evidence submitted by plaintiffs, it conclusively appears that Ferguson was not liable as an agent within the purview of the insurance code. It is admitted that Ferguson was neither the appointed nor acting general agent of these companies; that he had never before represented them, nor had any business relations with them whatever, and that his liability is to be judged wholly by his conduct with reference to this particular transaction.

Daniel A. Webster, one of plaintiffs, testified that about May 1, 1902, he applied for insurance, and, upon being informed by Ferguson

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that his company declined the risk, the witness said, "I am up a stump for insurance," to which Ferguson replied, "No, I will try some place else." Following this conversation Ferguson wrote to a firm of insurance brokers at Chicago, in part as follows:

> La Crescent, Minn., May 14, 1902.
>
> Samuel C. Wilson & Co.,
> Chicago, Ill.
>
> Gentlemen: D. A. Webster has asked me to write to you about insurance to the amount of $4,000 on his woolen mill, situated in the town of La Crescent, Houston Co., Minn. * * * [description of property]. Want only companies that have a right to do business in Minnesota. Send to D. A. Webster, La Crescent, Minn.
>
> Yours truly,
> P. Ferguson.

This letter was answered, calling for an application according to an inclosed form. A number of policies were then forwarded and received by Ferguson, and in reply, under date of May 24, he wrote Wilson & Co. as follows:

> Gentlemen: I rec'd the policies for M. Webster & Sons. I told you in my other letter to send them direct to D. A. Webster, as I simply wrote for Webster. How much will Webster send you? Can you give him any special offer?

The policies received, five in number, were then turned over by Ferguson to Webster, who took them to a bank at La Crosse, Wisconsin, consulted with a bank official and an insurance agent there, and obtained the rating of the companies from the insurance book of 1901, and from such examination and consultation Webster selected the three policies here involved.

May 27 Ferguson wrote to the state insurance commissioner, St. Paul, inquiring if the three companies mentioned had a right to do business within the state, and asking this question:

> Have I, as owner of property, a right to insure my property in any Co. that has a right to insure in the state, but has no local agent in this part of the state—have my policy come direct from company?

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In reply he was informed that the companies mentioned were not licensed to do business in Minnesota, but that there was a provision of law giving owners of property the right to place business outside upon filing a bond to guaranty the payment of a two per cent. tax upon premiums; that it would probably be very difficult to prevent the property owner from writing outside for a policy, advising to steer clear of irresponsible companies, which could not or would not comply with the laws of the state. Then follows a letter to Wilson & Co. of date June 7, written by Ferguson, inclosing $60, and one of June 11 to Wilson & Co., signed "M. Webster & Sons, by D. A. W.," as follows:

> Gentlemen: I took the underwriters of Chicago Ins. card to my bank and they claim that it is not any good in Minnesota. They said you would know what to do. I do not care for insurance, but as I have to borrow some money I have to have it satisfactory to the bank. Please to fix it up so that it will be sat. to the Ins. Com. of Minnesota, and that will make it sat. to the bank.

Another letter to Wilson & Co., of date July 15, is as follows:

> I send back the Ins. policies. The bank say they may be all right in Chicago, but they won't pass muster in Minnesota. Find enc. cash for bal. due. Unless you have Ins. that is quoted in Minnesota, there is no use sending. I have to satisfy the banks. They must have it all right, or there is no use trying.
>
> Yours res.
>
> M. Webster & Son.

The following letter, dated June 25, was also sent:

> S. C. Wilson & Co.
>
> Gents: My bank will not take, say there is no record in the state. D. A. Webster.

The code (Laws 1895, p. 392, c. 175) defines an agent as follows:

> Section 25. * * * Any person who solicits insurance and procures the application therefor shall be held to be the

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agent of the party thereafter issuing the policy upon such application or a renewal thereof, anything in the application or policy to the contrary notwithstanding.

Section 87. An insurance agent shall be personally liable on all contracts of insurance unlawfully made by or through him directly or indirectly for or in behalf of any company not authorized to do business in this state.

The code with reasonable certainty classifies insurance agents, and within certain limitations provides penalties for a violation of its terms. Thus section 88 makes one who negotiates a contract of insurance by an insurance company the agent of the company for the purposes of receiving the premium, notwithstanding terms to the contrary in the contract, and punishment is provided for fraudulently procuring the payment of premiums. Section 89 prohibits any officer or agent of a foreign insurance company from negotiating any business without a license from the insurance commissioner. Section 90 requires conspicuous designation of the place and nature of the business of foreign companies. Section 91 defines "insurance brokers," and provides for their license. Section 101 prescribes a penalty for any person who assumes to act as an insurance agent or broker without license, or

Who shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign company not admitted to do business within this state.

It is apparent that the object of the legislature was to provide the citizens of the state with reliable facilities for securing insurance and at the same time protect them against irresponsible companies. To that end these restrictions were thrown around foreign companies, and if reasonable they should be upheld, and such have been the views of this court, so far as expressed. Seamans v. Christian, 66 Minn. 205, 68 N. W. 1065; State v. Beardsley, 88 Minn. 20, 92 N. W. 472.

Looking to the scope of the act and the manifest care with which agents and brokers are defined and their liability determined, we do not feel warranted in limiting the liability under section 87 to those who act as insurance brokers, to actual agents of duly authorized companies who assume to negotiate business for nonlicensed foreign

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companies, or to those who are the accredited appointees of such unauthorized companies. For the purposes of this case we will concede that a person may constitute himself, by his conduct, an agent, within the meaning of section 87, without regard to whether he is the duly authorized agent of any licensed company, or the appointed representative of nonlicensed companies. But it does not follow that, because unlicensed persons are liable to punishment for in any manner transacting business with nonlicensed companies, under section 101, that such persons are liable to the insured for the amount of the loss sustained under section 87. The former section is consistent with the exercise of the police power of the state in regulating the business of insurance, the fine imposed commensurate with the object and for the benefit of the state, whereas the liability embraced in section 87 is of a civil nature, founded upon the law of contracts. It is declaratory of the law, rather than the imposition of a new remedy or a penalty. The liability does not exist in favor of the state. It grows out of the contractual relation of the parties, and can be enforced only by the insured, who has been made a victim in accepting unlawful insurance.

Although plaintiffs disclaim any knowledge of the correspondence, and deny that they knew what companies Ferguson was securing for them, it conclusively appears from the evidence that they had applied for insurance from different sources; that they knew Ferguson did not represent these companies; that they were in frequent consultation with him during the negotiations; that they personally examined into the rating, and accepted the policies; that they knew they were issued by foreign companies by S. C. Wilson & Co., Chicago. If they did not know the contents of the correspondence, and did not expressly authorize Ferguson to sign their names, they did know that the negotiations were pending on their behalf and at their request. Ferguson did not himself consult the bank or the La Crosse agent, or examine the rating card, and presumably the directions conveyed to Wilson & Co. in the letters of July 11 and July 15 were given after consultation with Webster. There is no evidence that plaintiffs were deceived by any word or deed of Ferguson and led to believe that the policies they accepted were issued by companies authorized to do business within the state. Ferguson's conduct all through shows that he was ignorant of the insurance laws, tried to post himself by inquiring from the

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commissioner, and although he probably had no right to assume that Wilson & Co. had complied with the law after receiving word from the commissioner, yet his letter to Wilson & Co. of July 11 would indicate that he expected that firm to take out licenses for these companies. True, he retained a commission of $20, but that does not stamp the transaction with fraud as between him and plaintiffs.

Our conclusion is that plaintiffs accepted the services of Ferguson with knowledge of the nature of the insurance secured, that they were not deceived by him, and that their acceptance of the policies did not depend upon whether he were licensed to do business in this state. Plaintiffs having failed to make out a case, the order dismissing the action was correct, and is accordingly affirmed.

Order affirmed.

DOUGLAS, J. (dissenting).

I am unable to assent to the conclusion reached by the court. In my judgment defendant Ferguson is an insurance agent within the meaning of section 87, and such insurance contracts were, to quote the language of the act, "unlawfully made by or through him" on behalf of the companies not authorized to do business in Minnesota. It is not disputed the legislature has authority, in the exercise of the police power, to provide reasonable regulations in the matter of the writing of insurance throughout the state. The legislature may even bar foreign companies from doing business here at all, or establish conditions as a basis therefor, and as an incident provide that any insurance agent who directly or indirectly negotiates such insurance shall be liable as a coinsurer for all losses incurred by any company under the terms of the policy so negotiated. Statutory regulations of this nature exist in Connecticut (Laws 1889, p. 55, c. 107), and have been upheld by the courts of Pennsylvania and Alabama. McBride v. Rinard, 172 Pa. St. 542, 33 Atl. 750; Noble v. Mitchell, 100 Ala. 519, 14 South. 581. See also Paul v. Virginia, 8 Wall. 168; Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207. The purpose of the legislature in enacting section 87 was to protect the public from the evil results incident to the writing of insurance throughout the state by so-called "wild cat" companies, and the provision making the agent negotiating such unauthorized insurance liable upon the contract nego-

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tiated was intended to operate as a check against the increase of such business.

Inasmuch as the court dismissed the action when plaintiffs rested, our inquiry is restricted to the question whether it appears prima facie that defendant by his acts brought himself within the provisions of this section, and thereby created a liability against himself. Daniel A. Webster, one of the plaintiffs, testified as follows:

> Q. Well, didn't you request him to write to other insurance agents? A. I did not. Q. You know, as a matter of fact, he did write to other insurance agents? A. I know it now; yes. Q. That he had written to other insurance agents? A. When? Q. To see if they couldn't place the insurance? A. In answering that question, when he told me that his company wouldn't take the risk I said I was up a stump for insurance, and he says, "No, I will write to somebody else." Q. What did you say when he said he would write to someone else? A. I said, "All right." Q. You knew his companies wouldn't take the insurance when he said he would try someone else? A. I knew he told me that.

It appears defendant knew, and plaintiffs did not know, at the time the latter paid the insurance premiums to defendant and he in turn remitted it (less his commissions) to the regular agents, that said companies were not authorized to do business in Minnesota. It is true plaintiffs were informed of this fact prior to their letter of June 11, but at that time the rights of all parties had become fixed, and the transaction closed. As appears from this letter, plaintiffs at that time (not the defendant as is suggested in the majority opinion) objected to the policies. At and prior to the time of the delivery of the policies plaintiffs were, as I read the record, misled into believing that the companies were authorized to do business in the state. Defendant assumed authority to collect the premiums, and retained a commission without criticism by the insurance companies, and without the knowledge of plaintiffs.

In my opinion the evidence quoted, read in the light of the undisputed facts, clearly tended to show that defendant solicited and negotiated the insurance in question, also that he was not only an insurance agent within the meaning of the term as used in section 87, but was the

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agent of said companies, particularly so in view of the last paragraph contained in section 25 of said act, which provides that:

> Any person who solicits insurance and procures the application therefor shall be held to be the agent of the party thereafter issuing the policy.

To hold that defendant was not the agent of the insurance companies, but, on the other hand, the representative of plaintiffs, and therefore not liable, will, in my opinion, open the door in Minnesota to the transaction of insurance business by such companies, and furnish them an easy method of violating its public policy as expressed by the legislature.

JOHN LOWRY v. CITY OF DULUTH.[1]

January 13, 1905.

Nos. 14,166—(181).

Assignment of Claim.

Section 277 of the charter of Duluth, relating to the assignments of contract for public work, construed, and *held* that it does not forbid or render void an assignment of the money due or to become due on the contract, made after the subject-matter of the contract has been completely executed by the contractor.

Affidavit of Payment.

Under section 276 of the charter of Duluth, which provides that, before any final estimate and payment on a contract for public work shall be made, the contractor or his personal representative shall make and file an affidavit that all claims for labor have been paid, *held*, such affidavit may be made by an assignee of the balance due on the contract, who has personal knowledge of the facts required to be stated in the affidavit.

Defendant city being indebted to Oscar H. Anderson in the sum of $3,239.26 upon a completed contract for the construction of sidewalks, the latter assigned his claim to plaintiff who thereafter presented the

[1] Reported in 101 N. W. 1059.

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account to the common council together with the requisite bond and an affidavit that all bills for labor and material used in the performance of the contract had been settled. The common council having approved said account and directed that the same be paid, defendant city appealed to the district court for St. Louis county. Issues were framed and the case was tried before Cant, J., who directed a verdict in favor of plaintiff for the full amount claimed. From a judgment entered pursuant to the verdict, defendant appealed. Affirmed.

Bert Fesler, for appellant.

Baldwin, Baldwin & Dancer, for respondent.

START, C. J.

On July 16, 1903, a contract was made between the city of Duluth and Oscar H. Anderson, hereafter referred to as the contractor, whereby he agreed to construct for the city certain cement walks during the year 1903. He entered upon the performance of his contract, and completed the work in substantial compliance with the terms thereof on November 15, 1903. Thereafter, and on December 8, 1903, he assigned to the plaintiff all of his rights under the contract, including all money due or to become due thereon, and authorized and directed its payment to the plaintiff, John Lowry. On February 29, 1904, the plaintiff requested of the common council of the city payment of the amount ($3,239.26) due on the contract, and offered to give a bond to secure the guaranty and maintenance of the work as provided by the contract. The common council then passed a resolution directing final estimates of the amount due on the contract to be made upon the execution and filing of such bond. The bond was made, duly approved and filed, and the final estimate made. On March 14, 1904, the plaintiff made and filed his affidavit that all claims for all work and labor performed on the contract had been paid in full. He had personal knowledge of the facts stated in his affidavit, for the reason that he had charge of the payrolls, and personally paid for all labor performed in the execution of the contract. The contractor had no personal knowledge in the premises. All claims for labor and material had in fact been paid before the estimate was made.

Before the plaintiff's claim had been paid, and on March 18, 1904, the city attorney, upon the request of seven taxpayers, appealed from

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the decision allowing the claim to the district court of the county of St. Louis. The contractor and the plaintiff were made parties to the appeal. The contractor made no claim for the amount due on the contract. The cause was brought to trial before the court and a jury. The evidence received on the trial was undisputed, and sufficient to establish the facts we have stated. The trial court directed a verdict for the plaintiff for the amount claimed. Judgment was so entered, from which the city appealed.

Two reasons are here urged by the city why the judgment should be reversed. They are:

1. The assignment by the contractor to the plaintiff is void by reason of the provisions of section 277 of the charter of Duluth, which is in these words:

> No contract on which a bond or deposit is required as provided in this charter shall be assigned or transferred in any manner and any assignment or transfer thereof, except by operation of law, shall fully end and determine such contract and shall make the same null and void as to any further performance thereof by the contractor or his assigns, without any act on the part of the city; and the city through its proper authorities shall at once proceed to relet such contract, or may at its discretion proceed to complete the same as the agent and at the expense of such contractor and his sureties.

The purpose and meaning of this section are obvious. Its purpose is to secure honest bids by the real parties in interest for contracts to be awarded by the city. Such a result is manifestly a matter of great importance to the city, and the charter provisions in question must be construed, if it is fairly permissible, so as to effectuate, and not to defeat, such purpose. While the character and responsibility of the contractor who is to execute a contract for public work is a matter of importance to the city, yet, after the work has been fully executed in accordance with the contract, and all claims for work and materials have been fully paid, it is a matter of indifference to the city whether it pays the balance due for the work to the contractor, or his assignee of such balance. Accordingly this section of the charter forbids an assignment of the contract, and provides for the enforcement of the prohibition by

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making the contract void as to further performance of the contract without any act on the part of the city; and the city must at once proceed to relet such contract, or complete the same as agent of the contractor, and at his and his sureties' expense.

Now, it is clear that this section deals with assignments which are made before the work or thing to be done, which is the subject-matter of the contract, is completely executed, and not to an assignment of the amount due to the contractor for such performance of the work. It is only as to future performance of the contract by the contractor or his assigns that the contract is void in case of its assignment. Again, it is only such unperformed part of the contract that the city must relet or complete at the expense of the contractor and his sureties. If the subject-matter of the contract is fully executed, what is there left for the city to do but to pay the balance of the contract price? How can a city relet or complete a contract for public work which has already been fully completed? But it is insisted on behalf of the city that the doing of certain things which the contractor must do in order to entitle him to a final estimate and payment for his work—such as filing an affidavit that all claims for work have been fully paid—is a part of his contract. This may be conceded. It is, however, perfectly obvious that it has no relevancy to the particular charter provision here under consideration. How could the city relet or itself complete the contract, as to filing of the affidavit, or as to any other act which the contractor must perform, after the work is fully completed, as a condition precedent to his right to demand payment of the balance due on the contract? This charter provision explicitly declares just what the effect of the assignment of the contract shall be, and just what must be done. When a statute specifies the effect of a certain provision, courts will presume that all the effects intended by the lawmaker are stated. Sutherland, St. Const., § 327.

It would not only violate this rule, but lead to the absurd results we have suggested if the provisions of this section should be construed as including assignments of the money due on a contract for public work, made after the work has been completed. We hold that section 277 of the charter of the city of Duluth does not forbid or render void an assignment of the money due or to become due on a contract with the city, made after the subject-matter of the contract has been completely executed by the contractor.

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2. The second reason urged why the judgment appealed from should be reversed is that neither the contractor nor his personal representative ever made and filed with the comptroller of the city the affidavit as required by section 276 of the charter of Duluth, which reads thus:

> Before any contractor or his personal representatives shall receive any estimates on any contract on which a bond or deposit is required as provided in this chapter, said contractor or his personal representatives shall make and file with the comptroller an affidavit that all claims for all work and labor to date, on the work for which an estimate is asked, have been fully paid.

The contention of the city is to the effect that the words "contractor or his personal representatives," as used in this section, must be construed as if the section read "contractor or his executor or administrator," and that the affidavit having been made in this case by the assignee, having personal knowledge as to the facts required to be stated in the affidavit, the city has no power to pay an honest debt amounting to some $3,300. What, then, is the meaning of the term "personal representatives," as used in this section 276? Primarily the term is to be construed as the equivalent of "executors or administrators," in the absence of some reason, suggested by the context and subject-matter of the statute using the term, for giving it some other meaning. It and the term "legal representatives" are sometimes used interchangeably, as signifying not only executors or administrators, but also those who legally stand in place of, or represent the interests of, another. Walter v. Hensel, 42 Minn. 204, 44 N. W. 57; Schultz v. Citizens Mut. Life Ins. Co., 59 Minn. 308, 61 N. W. 331; Willoughby v. St. Paul German Ins. Co., 80 Minn. 432, 435, 83 N. W. 377; Argall v. Sullivan, 83 Minn. 71, 85 N. W. 931; Staples v. Lewis, 71 Conn. 288, 41 Atl. 815; Hammond v. Mason & H. O. Co., 92 U. S. 724.

We are then to inquire whether the subject-matter of this section suggests any necessary or good reason why the term should not be given its usual and technical meaning, but the broader meaning we have indicated. If the term is to be construed as including only executors and administrators, then, if the contractor was a corporation, it could never be paid, for a corporation can only act by representatives, and it can never have any executors or administrators. If an individual contractor fully

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completes his contract, and pays for all labor and materials entering into its performance, and then becomes insane before making his affidavit, his claim cannot be paid. His guardian, although his legal representative, using the term in its broader sense, would not be his personal representative, giving to the term its narrow and technical meaning. Again, if the contractor did not have personal knowledge that all claims for all the work and labor had been paid, but his superintendent did have, and should make the affidavit, yet the contractor could not be paid, for the affidavit cannot be made upon information and belief of the contractor. There is no good reason why the affidavit should not be made by a legal representative or assignee of the contractor, having personal knowledge in the premises, for the object in requiring it is not to set a trap for the unwary, but to satisfy the city that all labor claims have been paid.

We are of the opinion, based upon the reasons suggested, and we so hold, that the term "personal representatives," as used in this section, was not intended to be limited to its technical meaning, but that it includes those persons who may stand in the place of, or represent the interests of, the contractor, including his assignee of the money due on his completed contract.

Judgment affirmed.

J. J. MENDENHALL v. HENRY ULRICH.[1]

January 13, 1905.

Nos. 14,178—(184).

Promissory Note—Fraud.

Action on a promissory note by an indorsee thereof. The answer alleged an oral agreement to the effect that the note should become operative as a contract only on the happening of a future event, which never occurred, and that the note was put in circulation by fraud.

Burden of Proof.

Held, that the answer stated a defense; that, after evidence had been given tending to show that the note was put in circulation by fraud, the

[1] Reported in 101 N. W. 1057.

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burden was on the plaintiff to show that he was a bona fide holder thereof without notice; and, further, that the trial court did not err in its rulings as to the admission of evidence, nor in refusing to direct a verdict for the plaintiff.

Appeal by plaintiff from an order of the district court for McLeod county, Cadwell, J., denying a motion for judgment notwithstanding the verdict or for a new trial, after a trial and verdict in favor of defendant. Affirmed.

R. H. McClelland, for appellant.

Sam G. Anderson, Jr., and *C. G. Odquist,* for respondent.

START, C. J.

Action on a promissory note. Verdict for defendant. The plaintiff appealed from an order denying his motion for judgment notwithstanding the verdict or for a new trial. The assignments of error challenge the correctness of the rulings of the trial court as to the admission of evidence, and of its action in refusing to direct a verdict for the plaintiff.

A brief statement of the pleadings is necessary to an understanding of the plaintiff's contention. The complaint alleged that on August 1, 1900, the defendant made his promissory note dated on that day, and thereby promised, for value received, to pay to the order of himself $173.73 six months after date, and on that date, for value received, he indorsed and delivered the note to E. E. Mendenhall; and, further, that before maturity such indorsee sold and indorsed it for value to plaintiff.

The answer admitted that the defendant signed and indorsed the note, but denied that it ever was delivered to E. E. Mendenhall, or to any one else, and alleged that it was given to him to be left at a designated bank under an agreement to the effect following: That Mendenhall should procure the issuance of a life insurance policy by an insurance company, which he claimed to represent, upon the life of the defendant, and send it to the bank for the inspection of the defendant; that the defendant should sign the note, which was for two years' premium on the policy, and that it should be left by Mendenhall at the bank until the policy should be received, when the defendant was to have the option of accepting or rejecting the policy; that, in case he rejected it, the note should be of no force or effect whatever, and should at once be returned to him; that, relying on the agreement, he signed the note, and handed

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it to Mendenhall; that a policy of insurance was offered to the defendant, which he refused to accept; and, further, that the note was never left at the bank or returned to him. The answer also denied that the note was ever sold or indorsed to the plaintiff before its maturity or otherwise, or in the regular course of business, and alleged that the transfer of the note, if made at all, was made in bad faith, without consideration, for the purpose of defrauding defendant of his rights under the agreement, "as plaintiff then and there well knew."

The reply put in issue the new matter alleged in the answer.

On the trial the plaintiff produced the note, introduced it in evidence, with the indorsements on the back thereof, and rested his case. The defendant was called as a witness in his own behalf. The plaintiff objected to his testimony on the ground that the answer did not allege any defense, for the reason that it alleges only an oral agreement to vary the terms of a written contract. The objection was overruled, and the defendant, over the objection and exception of the plaintiff, gave evidence tending to establish the agreement alleged in his answer. If the answer simply alleges, as plaintiff claims, an oral agreement varying the terms of a written contract which had become effective by an unconditional delivery thereof, it does not state a defense to the note. If, however, the answer alleges an oral agreement to the effect that the note should become operative as a contract only on the happening of a future contingent event, it states a defense.

It is well settled by the repeated decisions of this court that parol evidence is admissible to show that a written contract given by the maker to the party in whose favor it was drawn was not intended to be operative as a contract from its delivery, but only on the happening of some future event. Westman v. Krumweide, 30 Minn. 313, 15 N. W. 255; Merchants Exch. Bank v. Luckow, 37 Minn. 542, 35 N. W. 434; McCormick Harvesting Machine Co. v. Wilson, 39 Minn. 467, 40 N. W. 571; Minneapolis Threshing Machine Co. v. Davis, 40 Minn. 110, 41 N. W. 1026; Smith v. Mussetter, 58 Minn. 159, 59 N. W. 995. The answer states a defense within this rule, for it denies that the note was ever delivered, and alleges, in effect, that it was intrusted to E. E. Mendenhall to be left in the bank until the defendant exercised his option as to the insurance policy, and, if he rejected it, the note was to be returned to him.

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The plaintiff here makes the further objection to the answer that it does not charge that the plaintiff was not a bona fide purchaser for value of the note before maturity. No such objection was made in the trial court. The answer then must be construed, as to this last objection, with great liberality, and we hold that it tenders an issue as to whether the plaintiff was a bona fide indorsee of the note for value. It follows that the trial court did not err in overruling the plaintiff's objections to the admission of the defendant's evidence.

This leaves the question whether the court erred in refusing to direct a verdict for the plaintiff. It is claimed by the plaintiff that upon the pleadings and the undisputed evidence the plaintiff was entitled, as a matter of law, to a verdict for the amount of the note; hence the refusal of the court to direct such a verdict was error. We have disposed of the questions raised on the pleadings. The evidence is sufficient to sustain a finding by the jury that the agreement as to the note alleged in the answer was made, but the defense pleaded by the defendant would not be available against a bona fide purchaser for value of the note without notice, and before maturity.

It is urged on behalf of the plaintiff that there is no evidence to support a finding that he was not such a purchaser. The defendant's evidence tended to show that E. E. Mendenhall fraudulently put the note in circulation, instead of placing it in the bank, in accordance with the agreement alleged in the answer. This shifted the burden upon the plaintiff to show not only that he purchased the note for value, but that he did so in good faith, without notice or knowledge of the fraud. Cummings v. Thompson, 18 Minn. 228 (246); Merchants Exch. Bank v. Luckow, supra; Bank of Montreal v. Richter, 55 Minn. 362, 57 N. W. 61; Wallace v. Carpenter Ele. H. Mnfg. Co., 70 Minn. 321, 73 N. W. 189. The only evidence offered by the plaintiff tending to show that he was a bona fide purchaser without notice was the testimony of his brother, E. E. Mendenhall, who testified that he kept the note for about five months; then in the month of January, 1901, he sold it to the plaintiff for its face value. The plaintiff, however, did not testify upon the subject. Clearly, the question whether he purchased the note without notice was left by the evidence one of fact for the jury. Merchants Exch. Bank v. Luckow, supra; Drew v. Wheelihan, 75 Minn. 68, 77 N. W. 558.

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It is further claimed that the defendant had no right to reject the policy unless it was shown that he had some good reason for so doing. Such would not be the case if he had, as he substantially testified, the right or option to reject the policy if he was not perfectly satisfied with the deal. The trial court rightfully refused to direct a verdict for the plaintiff.

Order affirmed.

JOHN H. CAMERON v. DULUTH-SUPERIOR TRACTION COMPANY.[1]

January 20, 1905.

Nos. 14,007—(51).

Negligence—Evidence.

The evidence was sufficient to sustain the findings of the jury with reference to the following issues, which were properly submitted by the trial court: That the parents of the child were not guilty of negligence in intrusting the child to the care of an older sister; that the children were not guilty of contributory negligence in attempting to cross the street railway tracks in front of an approaching car; that the motoneer of the car was guilty of negligence in not attempting to slacken the speed of his car, and get it under control, in anticipation of injury to the children who were approaching the tracks.

Charge to Jury.

The court did not err in refusing to instruct the jury that the motoneer was not guilty of wanton or wilful negligence, inasmuch as the cause was not tried upon that theory, and such issue was not submitted to the jury by the court.

Speed of Car.

It was not error for the court to permit a certain witness to testify with reference to the speed of the car, for the reason that proper objection was not made, and the answer was not stricken out.

Verdict.

A verdict of $2,000 was not excessive, considering the age of the boy and the nature of his injuries.

[1] Reported 102 N. W. 208.

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Action in the district court for St. Louis county to recover $5,000 for personal injuries sustained by plaintiff's minor son. The case was tried before Dibell, J., and a jury, which rendered a verdict in favor of plaintiff for $2,000. From an order denying a motion for a new trial, defendant appealed. Affirmed.

Thos. S. Wood, for appellant.

John Jenswold, Jr., for respondent.

LEWIS, J.

Defendant company operated a street railway system in Duluth. East Fourth street is about sixty six feet wide, and defendant's tracks are laid upon the northerly side thereof, leaving the southerly side for a driveway. The northerly of the two tracks is adjacent to the curb upon the north side of the street, and is used for cars running towards the city, while the southerly track is for cars running from the city; the distance between the two tracks being about nine feet. At a point upon the southerly side of Fourth street, between Twelfth and Thirteenth Avenues East, is located the Hartnett store; and on the opposite side of the street, a little to the west, about midway in the block, is another small store. Plaintiff's infant son, aged four years and seven months, left the family residence, at Sixteenth Avenue East and Fourth street, in charge of a sister eleven years old, and also accompanied by a younger brother, three and a half years of age; the children having been sent by the mother to the Hartnett store to make a purchase. They reached the store, made the purchase, and, while crossing the street in a diagonal direction to the other store, William ran in front of an approaching car from the east, and was injured.

The trial below resulted in a verdict for plaintiff, and defendant appealed from an order denying a motion for a new trial. The court submitted to the jury all of the issues presented at the trial: Were the parents guilty of negligence in sending the children to the store in charge of an eleven year old sister? Were the children guilty of contributory negligence? And was defendant guilty of negligence in the operation of its car, under the circumstances of the case?

1. The evidence is sufficient to sustain the holding of the jury in respect to each of these propositions. The little girl was the oldest child in the family, and had frequently taken charge of the younger children

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in going to and from school and other places; and in this respect it does not appear, as a matter of law, that the parents were guilty of negligence in thus intrusting the child to the sister's care.

There was evidence tending to show that at the time in question the children came out of the Hartnett store, intending to cross the street diagonally to the other store; that the boy William ran ahead of the other children; that the sister started after him, and endeavored to catch hold of him, but he, oblivious to any danger, ran in front of the car, and was caught upon the fender, but rolled off under the car, and was injured. Considering the circumstances, the age of the boy, and the evident purpose of the sister to keep control of him, they were not, as a matter of law, guilty of contributory negligence.

As to the negligence of those in charge of the car, the evidence shows that the place where the boy was struck was about two hundred ninety feet westerly from Thirteenth avenue; that the car did not stop at Thirteenth avenue, and was traveling at the ordinary rate of speed in that locality—about twelve or fifteen miles an hour. As the boy approached the southerly track, closely followed by his sister, leading the younger brother, the car was just passing Thirteenth avenue, and the boy was in plain sight of the motoneer and certain witnesses standing beside him, and others in the car and at the front of the store. According to the evidence of these people, the position of the boy was seen, and the possibility of danger to him apprehended, for they called out to attract the child's attention; and the motoneer distinctly saw the children as he passed Thirteenth avenue, and made the remark, "I wonder if those kids will cross the track." Notwithstanding the speed at which the car was going, the motorman made no effort to stop the car and avoid the possibility of an accident until he was within twelve or fifteen feet of the place where the boy might cross the track, when suddenly the child stepped in front of the car, the motorman reversed the electric current, dropped the fender, and caught the boy; but, before the car could be brought to a standstill, he rolled off the fender, under the car, and was injured. The position of the boy in advance of the other children, and the fact that they were going in a well-known direction, were sufficient to put the motoneer upon his guard, and to require him to control the speed of his car in order to prevent a possible accident.

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At least, it was a question for the determination of the jury whether, under those circumstances, the motoneer was guilty of negligence in failing to get his car under control in anticipation of a collision at a point where the children might cross the track if they did not notice the approaching car. There are no new principles of law involved in this case. The question of the amount of care required from those in charge of street cars—motormen and conductors—is discussed fully in Strutzel v. St. Paul City Ry. Co., 47 Minn. 543, 50 N. W. 690, and Gray v. St. Paul City Ry. Co., 87 Minn. 280, 91 N. W. 1106.

2. Although the complaint alleged that the motorman wantonly failed to stop the car in time to avoid the accident, the case was not tried upon that theory; and the court submitted the case to the jury entirely upon the proposition of a failure to exercise ordinary care on the part of defendant, and upon the question of contributory negligence on the part of plaintiffs. This was equivalent to informing the jury that the question of wanton or reckless conduct on the part of the motoneer was not in the case, and hence it was not error to refuse a specific instruction upon that point at the request of defendant.

3. It was not error for the court to refuse to receive in evidence a certain ordinance of the city permitting cars to run at the rate of twenty miles an hour upon the street in question. In the first place, there was not sufficient evidence that the ordinance was in force at the time of the accident; and also it was immaterial for the reason that the charge of negligence against defendant was not in running its car at an unlawful rate of speed, but, under the circumstances, in running it in a negligent and careless manner.

4. Error is assigned for permitting a witness to testify that the car was running from fourteen to fifteen miles an hour, upon the ground that no proper foundation had been laid. The objection did not go to the question as finally answered, and no motion was made to strike the answer out.

5. The verdict of $2,000 was not excessive. The child received a severe scalp wound, and his limb was fractured, and, according to the testimony of the physician, although perfectly healed, the limb was shortened at least half an inch, and the boy is compelled to wear an extra thick sole and heel on his shoe to overcome the tendency of curvature of the

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spine. Considering the effect such a burden must necessarily have upon the life of a child, and the probability of the permanency of the injury, it cannot be said that the verdict was too large.

Order affirmed.

JONAS GUILFORD v. MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY and Another.[1]

January 20, 1905.

Nos. 14,062—(161).

Obstruction of Highway.

An action cannot be maintained by a private person for interference with or obstruction to a public highway unless he is thereby specially injured, and in a way not common to himself with the public at large.

Special Injury.

The facts set forth in the complaint do not show that the plaintiff was specially injured in a manner different in degree or kind than the public generally, and therefore it fails to state a cause of action.

Appeal by plaintiff from an order of the district court for Hennepin county, Willard R. Cray, J., sustaining separate demurrers to the complaint interposed by defendants Minneapolis and St. Louis Railroad Company and City of Minneapolis. Affirmed.

Jonas Guilford, pro se.

Albert E. Clarke, Frank Healy and *L. A. Dunn,* for respondents.

LOVELY, J.

This is an appeal from an order sustaining a general demurrer to plaintiff's complaint.

It is substantially alleged in the complaint that the defendant railway company is a corporation organized under the laws of the state; that plaintiff is the owner of a portion of certain lots in Groveland Addition to Minneapolis, according to the recorded plat; that he is in possession

[1] Reported in 102 N. W. 365.

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of this property, which was dedicated to the public; that the city became a trustee of such streets; that the dedication was accepted, and the streets used by defendant; that Lyndale avenue is another street, which terminated in Aldrich avenue (with a further description of other streets on the plat); that within the last ten years, from time to time the railroad company, by its servants, unlawfully entered upon a portion of Chestnut avenue, without the same having been vacated, which was no part of the railroad right of way, and has established thereon its railroad tracks, and has used the same continually, thereby excluding the public therefrom; that these tracks are not used for general railroad purposes, but to transport fuel in carloads to a private fuel company, by reason of which the entire public is excluded therefrom, including the plaintiff, who has an easement in the street, and has a right to travel the same by reason of his ownership of a portion of the lots in Groveland Addition; that plaintiff has demanded that the defendant remove the railroad from the streets, where it occupies the same, and asks in his prayer for relief that the railroad company and the city, which is also made a defendant, remove the tracks from Chestnut avenue, and for such further relief as may be just and equitable.

The complaint fails to set forth that plaintiff has suffered any special damages, different in kind or degree from those sustained by the general public, and it was conceded at the argument that he had not; but his contention here was that the city, as a trustee of the general public, was required to remove the tracks from Lyndale avenue, and that the railroad company should, in plain terms, be ejected therefrom.

The rule is now well settled and established by numerous cases in this court that no action can be maintained by a private individual for interference or obstruction to a public highway, unless he is thereby specially injured, and in a way not common to himself and the public at large—different in kind and degree to his fellow citizens of the municipality. Shaubut v. St. Paul & S. C. R. Co., 21 Minn. 502; Rochette v. Chicago, M. & St. P. Ry. Co., 32 Minn. 201, 20 N. W. 140; Barnum v. Minnesota Transfer Ry. Co., 33 Minn. 365, 23 N. W. 538; Shero v. Carey, 35 Minn. 423, 29 N. W. 58; Thelan v. Palmer, 36 Minn. 225, 30 N. W. 670; Adams v. Chicago, B. & N. R. Co., 39 Minn. 286, 39 N. W. 629; Swanson v. Mississippi & R. R. Boom Co., 42 Minn. 532, 44 N. W. 986; Lakkie v. Chicago, St. P., M. & O. Ry. Co.,

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44 Minn. 438, 46 N. W. 912; Gundlach v. Hamm, 62 Minn. 42, 64 N. W. 50; Long v. City of Minneapolis, 61 Minn. 46, 63 N. W. 174.

The right of action by an individual for a public nuisance in the construction of a highway, and hence to abate or remove the same, must be based upon the ground of special injury, or must arise upon such right; and it is essential that the facts showing the nature of his wrongs, and that they are different in kind and degree from those sustained by the general public, must be set forth in the complaint; and it discloses no cause of action unless it is so clearly expressed. Shero v. Carey, supra.

Order affirmed.

FRANK A. PHILLIPS v. GREAT NORTHERN RAILWAY COMPANY.[1]

January 20, 1905.

Nos. 14,104—(117).

Negligence of Fellow Servant.

It became necessary for a locomotive engineer attached to an ore train to move the same. He received a proper signal to back, but was required to pull forward before the backward movement could be effected. In the performance of this duty a brakeman on the rear end of the train, one thousand feet distant from the engineer, was thrown to the ground, and suffered injuries for which he recovered a verdict. *Held*, under the facts, that the inference that an alleged violent jar to such plaintiff was from the engineer's negligent operation of his engine was not warranted, and that the claim upon the evidence that this servant failed to exercise proper care was at best a matter of conjecture and surmise, which could not establish his misconduct.

Appeal by defendant from an order of the district court for Ramsey county, Olin B. Lewis, J., denying a motion for judgment notwithstanding the verdict or for a new trial, after a trial and verdict in favor of plaintiff for $1,000. Reversed and judgment ordered for defendant.

[1] Reported in 102 N. W. 878.

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W. R. Begg, J. A. Murphy, and *Heber McHugh,* for appellant.
Samuel A. Anderson, for respondent.

LOVELY, J.

This action was brought to recover for injuries sustained by a railroad brakeman through the alleged negligence of his fellow servant, the engineer, in the movement of his engine and a train of cars. There was a verdict for plaintiff, a motion for judgment or a new trial, which was denied. This appeal is from that order.

Plaintiff was a rear brakeman on an ore train in the yards near the Letonia mine at Hibbing, when it became necessary for him to stand on the rear car of the train, and to give a signal to back the engine and train in order to make a coupling with two disconnected cars on the track. The signal to back was properly given and properly transmitted to the engineer, but it is claimed that the latter, in applying his steam, moved and operated his locomotive so negligently that plaintiff was, by the unusual and unnecessary jar occasioned thereby, thrown to the ground and injured. The distinctive claim made in the complaint is that while a freight train was properly on the track, and the signal to back was given to the engineer by the plaintiff standing thereon, that the latter prepared himself for a backward movement to prevent being thrown from the train; that the engineer failed to obey the signals to back the train, but, without signals from any source, improperly and negligently started the train ahead, of which plaintiff had no notice, and that solely by reason of the forward instead of the backward movement the brakeman was hurled from the top of the train to the ground and received the injuries complained of.

It conclusively appeared at the trial from the evidence that the train was composed of forty loaded ore cars, the tops of which were twelve feet above the track; that they were coupled together, and attached to the engine, by the operation of which, under the management of the engineer, the movements of the train had to be made when necessary. The night was dark; signals were to be given with lanterns. A proper signal was given by the plaintiff from his place on the rear car for the backward movement. This could not be seen by the engineer, who was on his engine one thousand feet ahead of

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the brakeman. The view of any signals from the rear being obstructed by a curve, they had to be transmitted through other employees, which was properly done. The engineer, in attempting to back the train, found it impossible by reason of the fact that there was no slack between the cars in the train, they being closely bunched. The engineer, finding that he could not move the train backward, started it ahead to take out the slack, in order to obtain the proper momentum to obey the order to back. The plaintiff, immediately on giving the signal, according to his own admissions prepared himself for a backward movement, evidently without taking into consideration the probability, which concededly should have been obvious, that the engineer would have to move his engine ahead and take out the slack between the cars in order to back. The forward movement by the engineer was made, he not only took out about twenty-two feet of slack between the cars, but continued to move forward to some extent, causing what plaintiff describes as a violent jar, throwing him from the car on which he was standing. He struck upon his feet on the ground. His ankle was seriously sprained, though he received no other injuries.

The trial court accepted the view, based upon the testimony of the plaintiff, that the latter knew that it might be necessary, if the cars were bunched as in this instance, to pull out the slack; but it is insisted that the calculation of the engineer, at the point where he was placed, was not sufficiently correct or accurate, and that he went ahead too far, and in doing so was careless, upon which evidence of carelessness the verdict must be sustained, if at all.

We have examined the evidence very carefully, and, considering the situation as it existed at the time of the accident in all its lights, find no evidence that an extraordinary and unusual movement of the locomotive was made by the engineer, unless it is to be derived from the testimony of the plaintiff himself that there was a violent jar of the car on which he stood, by reason of which he was thrown to the ground, and the rear car moved forward two or three lengths. The terms by which the movement of this car is characterized, in connection with the fact that the plaintiff had prepared himself for a different movement than he might well have expected under his own testimony, constitutes and furnishes all upon which, under the facts, any charge of

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the engineer's negligence can possibly rest, and decidedly impresses us with the view that there could be no more than a surmise that such employee failed to perform any duty which he owed to plaintiff.

It was conceded by the plaintiff, who was a brakeman of many years' experience, that the engineer, upon receiving a signal to back, if there was no slack in the train under the circumstances of this case, must first move forward, and the distance of such movement was necessarily a matter largely within his judgment, which was to be exercised in applying the power of the engine to forty cars extending along the track a distance of one thousand feet; and it does not seem possible that nice calculation of the effect of the forward movement before the reverse could be secured to the heavy train behind was easy to be made or accomplished with accurate or mathematical certainty. These undisputed facts were known to the plaintiff, who stood on his car prepared for a different movement than he should have expected. The movements of his own car are the only evidence in this case from which an inference that the engineer failed to perform his duty can be claimed, which is at best, in our opinion, under the circumstances, but a matter of mere impression, and is nothing more.

All the witnesses whose evidence could be relied upon were examined, and do not controvert the facts stated above, nor is it possible to imagine the existence of other testimony that would tend to indicate that the engineer was derelict in the performance of his duty.

We are clearly of the view that the request for a verdict for defendant should have been granted by the trial court. It is therefore directed that judgment be ordered in favor of defendant.

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PETER PETERSON v. HENRY KNUUTILA.[1]

January 20, 1905.

Nos. 14,114—(174).

Garnishment—Necessary Parties to Appeal.

In garnishment proceedings in the municipal court of Eveleth plaintiff appealed from a judgment rendered against him in favor of an intervening claimant, but neither the garnishee nor defendant in the action took any part therein. *Held*, that they were not necessary or material parties to the appeal in the district court.

Evidence.

On the appeal to the district court, evidence considered, and *held* sufficient to sustain the order for judgment in favor of the intervening claimant as well as against the plaintiff for costs.

Appeal by plaintiff from a judgment of the district court for St. Louis county, entered pursuant to the findings and order of Dibell, J. Affirmed.

N. B. Arnold and *W. G. Bonham*, for appellant.

Baldwin, Baldwin & Dancer, for respondent.

LOVELY, J.

This action was tried in the municipal court of Eveleth against Henry Knuutila, defendant, and the Oliver Iron Mining Company as garnishee. The garnishee appeared, and disclosed an indebtedness to the defendant of $58.70. The Saari Bros., a partnership, intervened as claimants, and sought to establish ownership to the funds disclosed in the hands of the garnishee by virtue of an alleged assignment of the same from the defendant. The jury in the municipal court returned a verdict in favor of the claimants, upon which judgment was entered. Plaintiff appealed to the district court upon questions of law alone. The decision of the municipal court was sustained. Judgment was entered in favor of the claimant against the garnishee for the amount disclosed, and also against the plaintiff for costs; whereupon plaintiff appeals to this court. Neither the defendant nor the garnishee is made a party to the appeal to the district court. On the call of the calendar in

[1] Reported in 102 N. W. 368.

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the district court the claimants, Saari Bros., moved to dismiss the appeal for defect of parties, and for judgment upon the merits.

We are quite clear that the grounds upon which objection is made to the failure to make the defendant and garnishee parties are not well taken. Neither made any complaint or asserted any right to the subject of the litigation in the district court. There was practically a disclaimer by both of any interest in the result of the suit, and the fact that they were not made parties to the appeal in that forum is of no materiality whatever. The contest was wholly one between the plaintiff and the intervening claimants, and was so properly litigated and determined.

Upon the merits, however, we have arrived at the conclusion, from the testimony returned by the municipal court, while it appears that the written assignment to the claimant was excluded, yet upon the whole it was sufficient to support the conclusion that there had been a valid and legal transfer of the claim for labor of defendant against the Oliver Iron Mining Company to the Saari Bros. before the action was commenced by plaintiff against the defendant, and that substantial justice was awarded by the order affirming the action of the municipal court in favor of the intervening claimants, from which the judgment for costs directed against plaintiff would follow as a matter of course.

Judgment affirmed.

LODOWIC D. HAUSE v. CITY OF ST. PAUL.[1]

January 20, 1905.

Nos. 14,128—(196).

Judgment in Local Assessment Proceeding.

Judgments in local assessment proceedings conducted by the city council under the provisions of the charter of St. Paul stand upon the same basis as judgments in ordinary tax proceedings, and cannot be impeached in a collateral action by showing a want of authority in the city council to order the improvement for which the assessment was made.

Case Distinguished.

Hawkins v. Horton, 91 Minn. 285, distinguished and explained.

[1] Reported in 102 N. W. 221.

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Action in the district court for Ramsey county to determine the adverse claims of defendant to certain land. The case was tried before Olin B. Lewis, J., who found in favor of plaintiff. From an order denying a motion for a new trial, defendant appealed. Reversed.

J. C. Michael and *G. R. O'Reilly,* for appellant.

S. C. Olmstead and *W. T. McMurran,* for respondent.

BROWN, J.

This action was brought against the city of St. Paul to determine adverse claims to certain real property located in the city. Defendant interposed in defense that it held a lien upon the property by virtue of certain certificates of sale issued pursuant to a judgment and sale in local improvement proceedings conducted by the city, in which the property was assessed for benefits accruing thereto by the improvements made. For aught that appears from the record, the court in which the judgment in those proceedings was rendered had jurisdiction of the subject-matter, and all proceedings therein, leading up to and including the entry of the judgment and subsequent sale, were in all things regular and in conformity with law. Plaintiff seeks to impeach the certificates for defects in the proceedings, anterior to the judgment, the precise defect urged being a failure on the part of the city council to observe certain provisions of the city charter authorizing the proceedings.

The charter of the city of St. Paul, in reference to local improvements of the nature of those here involved, provides that no such improvement shall be ordered until at least one-third of the owners of property to be affected shall petition for the same. At the trial plaintiff offered to show that the proceedings under which defendant claims its lien were unauthorized by the proper petition; that no petition signed by one-third of the property owners to be affected by the improvement was, prior to the time the city council ordered the same, presented to that body. The evidence was objected to, and the objection overruled by the trial court, to which ruling the city excepted. The court ordered judgment for plaintiff, and defendant appealed from an order denying its motion for a new trial.

The only question presented is whether the judgment, pursuant to which defendant's certificates were issued, and under which it claims its asserted lien, is void by reason of the fact that proceedings before the

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city council were not initiated by a proper petition. It was held in Hawkins v. Horton, 91 Minn. 285, 97 N. W. 1053—a case involving the validity of local improvement proceedings under provisions of the charter of the city of Duluth similar to those of the city of St. Paul—that the city council was unauthorized to order an improvement of the kind, except upon petition of the owners of the property to be affected thereby, and that a properly signed petition was, under the charter, a jurisdictional prerequisite to the authority of the council to proceed. That case must be taken as decisive that a proper petition is an essential prerequisite in such proceedings. It does not follow, however, that the judgment in the proceedings in question was void by reason of the fact that the necessary petition was not presented to the city council.

If the question were presented in a direct proceeding, the absence of a petition would be fatal, but in the case at bar it is presented in a collateral proceeding; and this, all our decisions, where the point has been presented, hold cannot be done. Judgments in local assessment proceedings under municipal charters have been uniformly placed upon the same basis and footing as judgments in ordinary tax proceedings. The jurisdiction of the court to render the judgment is presumed, and it cannot be attacked collaterally for defects in the proceedings anterior to the judgment, and this includes defects which go to the jurisdiction of the city authorities to order the improvement or initiate or conduct the proceedings. Where it appears that the court had jurisdiction of the subject-matter, and acquired jurisdiction of the owners of property affected, in the manner prescribed by charter, the judgment rendered therein is valid, and any defense which the landowner has against the assessment because of errors or irregularities in the proceedings prior to the judgment is res judicata. Hennessy v. City of St. Paul, 54 Minn. 219, 55 N. W. 1123; City of Duluth v. Dibblee, 62 Minn. 18, 63 N. W. 1117; State v. District Court, 51 Minn. 539, 53 N. W. 800, 55 N. W. 122. Following these, and other decisions of this court on the subject, the conclusion must be that the judgment and sale under which defendant claims a lien on the property in question were valid, and cannot be impeached in this collateral action on the alleged ground that the city council had no authority to order the improvement for which the assessment was made.

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The trial court disposed of the case in reliance upon Hawkins v. Horton, supra; but the question whether a judgment in such proceedings, appearing fair upon its face, could be attacked collaterally for want of jurisdiction in the city authorities to order the improvement was not presented by counsel, considered, or decided. The decision in that case was made on the theory that the attack on the judgment was direct, and not collateral. The validity of the judgment and sale there before the court was litigated by the consent of parties in the trial court. The facts showing the absence of a petition requesting the city council to order the improvement there involved were expressly found by the trial court, to which no objection was made. When the cause reached this court the point that the judgment could not be attacked collaterally was not made in the briefs, and the court treated the case as a direct attack, and disposed of it accordingly. It is therefore not in point in the case at bar.

Order reversed and new trial granted.

CHARLES WERNER and Others v. JOSEPH POPP.[1]

January 20, 1905.

Nos. 14,145—(193).

Surface Water.

The common-law rule that surface water is a common enemy, which the owner of lands may convey therefrom by ditches or drainage, subject to the modification that in so doing he may not cause unnecessary or unreasonable damage, as laid down in Brown v. Winona & S. W. Ry. Co., 53 Minn. 259, and Sheehan v. Flynn, 59 Minn. 436, is adhered to and followed as the law of this state.

Appeal by plaintiffs from an order of the district court for Benton county, Searle, J., denying a motion for a new trial, after a trial and findings in favor of defendant. Affirmed.

Stewart & Brower, for appellants.

J. D. Sullivan, for respondent.

[1] Reported in 102 N. W. 366.

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LOVELY, J.

This was an equitable suit for an injunction to restrain defendant from maintaining a ditch on his farm lands whereby a quantity of surface water accumulating thereon was transferred therefrom to the lands of the plaintiffs, who were lower proprietors, to the detriment and injury of the latter. The court made findings of fact, and denied the relief asked. There was a motion for a new trial, which was refused. From this order plaintiffs appeal.

This review brings again to this court the very much discussed question of the right of the owners of agricultural property to improve the same by transferring through ditches and drainage the surface waters thereon to adjacent proprietors. The short facts necessary to an understanding of the questions involved may be briefly stated: Plaintiffs were the owners of about four hundred acres of land in section 8, township 38, range 31, in Benton county, which were contiguous. This tract of land lies south of a highway on either side of which public ditches were constructed and in operation. North of this highway defendant was the owner of a farm of one hundred twenty acres in section 5 of the same town. Some fifty rods from the highway, on defendant's land, there were about twenty five acres of ordinary lowland, which was worthless in wet seasons, but reclaimable for agricultural improvement by means of drainage, which defendant attempted to secure by the construction of a ditch running in a southerly direction to the public ditch. This drain was constructed entirely on defendant's own land. The court found, and it is not disputed, that defendant diverted no natural watercourse, and was guilty of no unreasonable exercise of care or duty in this respect, but adopted the most feasible and practical method of securing the drainage he desired.

In the construction of defendant's ditch, which is sought to be enjoined, the defendant's pasturage was reclaimed, but the surface waters were transmitted through the artificial channel he created into the public ditch, through which they flowed easterly to a depression or dry run extending southerly upon plaintiffs' lands, and by means thereof not only were waters transmitted from the defendant's land, but from lands east and west thereof, to what extent the court was unable to determine. The water thus transmitted through a natural runway or depression flowed into two ponds on the land of plain-

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tiffs, and to a considerable extent damaged and injured the pasturage surrounding the same, the extent of which the court was unable to ascertain, and we do not, in the disposition of this case, consider it material.

There are numerous decisions of this court in which has been considered the right of an upper proprietor to improve his land at the expense of lower proprietors, where to do so it became necessary to secure by drainage his own improvement at the expense of his neighbor. There was much confusion in the law on the subject when the case of Brown v. Winona & S. W. Ry. Co., 53 Minn. 259, 55 N. W. 123, was decided, in which the then chief justice of this court reviewed the previous decisions and stated the rule as follows: When an owner improves his land for the purpose for which such land is ordinarily used, doing only what is necessary for that purpose, and being guilty of no negligence in the manner of doing it, he is not liable because, as an incident of so improving, surface waters accumulate and flow in streams upon the lands of others. The test of liability must be, is the injury incidental to another man doing on his own land what he has a right to do, i. e., improve it for the purposes for which such land is ordinarily used, doing what is necessary for that purpose? This is an exceedingly clear statement of the law applicable to the subject, but is somewhat confused by a qualification in these words: "It must, however, be understood that one cannot improve his own land by merely transferring waters which would naturally rest upon it to the land of another." An examination of the record in this case discloses very clearly that by this qualification no more was meant than that such improvement must be necessary, and that the course pursued is practical, proper, and the least calculated to occasion injury which the circumstances will permit. That this was the result intended to be reached in that case is clearly indicated by the decision in Oftelie v. Town of Hammond, 78 Minn. 275, 80 N. W. 1123. And that this court regards itself as fully committed to the doctrine that surface waters are to be considered a common enemy, which may be thrown from the owner's land upon a lower proprietor, subject to the rule of "sic utere," even though it may injuriously affect him, was decided after full and thorough examination of all the authorities relating to the subject in Sheehan v. Flynn, 59 Minn. 436, 61 N. W. 462.

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The learned counsel for appellant realizes the force and effect of this decision, and combats the reasoning therein with much ability; but after a full consideration of the claims submitted on this review we are constrained to adhere to the rule there laid down that surface water is a common enemy, which each owner may get rid of as best he can, subject to the modification that he must so use his own as not unnecessarily or unreasonably to injure his neighbor; and that under this rule the right of defendant to remove the surface water from his own land by ditches, though it flows upon that of his neighbor, if it is necessary for improvement, and not unreasonably done, is a privilege incident to his right of ownership.

Order affirmed.[2]

CITY OF FERGUS FALLS v. L. C. EDISON.[1]

January 20, 1905.

Nos. 14,146—(169).

Use of City Sewer.

City of Fergus Falls v. Boen, 78 Minn. 186, followed, and the liability there sustained against a person making use of a sewer constructed by the city *held* to apply not only to persons owning property abutting on the street on which the sewer was laid, but to all owners of property in the vicinity who connect their residences with, and make use of, the sewer.

Action in the district court for Otter Tail county to recover $33 alleged to be due by reason of defendant having connected his premises with plaintiff's sewer. The case was tried before Baxter, J., who found in favor of defendant. From an order denying a motion for a new trial, plaintiff appealed. Reversed.

N. F. Field, City Attorney, for appellant.

Chas. C. Houpt, for respondent.

BROWN, J.

In 1887 the city of Fergus Falls constructed a sewer along Union avenue to the grounds of the Insane Hospital, located on the outskirts of

[2] For opinion on reargument, see infra, page —.

[1] Reported in 102 N. W. 218.

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the city, one half the expense of which was paid out of the permanent improvement fund of the city, and the other half by the state of Minnesota. The expense incurred by the city in the construction of the sewer was not defrayed by an assessment against the abutting property, but, for the purpose of reimbursing itself, the city council duly passed a resolution reciting the construction of the sewer, its location, and other details, and that

> Any person or persons may connect their premises adjoining said sewer or on a line with said sewer, by paying into the city treasury of said city the sum of thirty-three dollars for each house service, said connection or connections to be made under the direction and supervision of the city engineer, and in accordance with the ordinances of said city.

Defendant and one Frey, at their own cost and expense, with the consent of the city, constructed a sewer for a short distance along Hazel street—a street intersecting with Union avenue, on which the city sewer was laid—connecting the same with the city sewer on the latter avenue. In the summer of 1899, the defendant, who owns premises fronting on Lakeside Drive, about a block distant from Union avenue, connected his residence with said sewer so constructed on Hazel street; thus making complete connection between his residence and the city sewer on Union avenue. The city demanded of him payment of the amount fixed by the resolution above quoted. He declined to pay, and this action followed. Upon the facts stated, which were agreed to, the trial court ordered judgment for defendant, and plaintiff appealed from an order denying its motion for a new trial.

The only question presented for consideration is the construction of the resolution, and whether defendant comes within its scope. The validity of the action of the city in adopting this method of reimbursing itself for the expense of the sewer was sustained in the case of City of Fergus Falls v. Boen, 78 Minn. 186, 80 N. W. 961—a case involving the action of the city in this particular matter. The resolution provides that any person may connect his premises adjoining said sewer, or on a line with it, by paying the amount specified therein. Defendant's premises did not abut upon Union avenue, nor adjoin that avenue, and for this reason he insists that he does not come within the scope of the resolu-

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tion. The resolution is entitled to a reasonable construction. The purpose of it was to provide means to reimburse the city for the expense incurred in laying the sewer, and it should be so construed as to authorize the city to demand of all persons in the vicinity of the sewer, who connect with and make use of the same, payment of the amount fixed for such connection. So construing it, defendant comes within its scope and purpose, and is liable, under the decision in the Boen case, for the amount claimed by plaintiff.

As already suggested, the purpose of the resolution was to reimburse the city for the cost of the sewer. Whether, after it has been fully reimbursed, it may still require property owners making use of it to pay the amount fixed by the resolution, we need not determine. For aught that appears from the record in the case now before us, the city has not yet been fully reimbursed; and clearly, until then, it may require property owners in the vicinity of the sewer, making use thereof, to pay therefor.

Order reversed and new trial granted.

CITY OF MOORHEAD v. T. L. MURPHY.[1]

January 20, 1905.

Nos. 14,153—(194).

Police Officer.

In the absence of prohibitive charter provisions, a municipality has the power to reimburse a police officer for expenses and attorney's fees incurred in the defense of an action for false imprisonment; it appearing that the officer was acting in good faith in the exercise of his official duties.

The common council of the city of Moorhead having allowed and caused to be paid a bill incurred by defendant while acting as chief of police of said city for attorney's fees and disbursements in defending an action for false arrest and imprisonment, an appeal was taken by

[1] Reported in 102 N. W. 219.

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plaintiff city to the district court for Clay county. Thereupon defendant filed a complaint setting up the facts and praying that the appeal be dismissed. From an order, Baxter, J., sustaining a demurrer to this complaint, defendant appealed. Reversed.

Wm. R. Tillotson and *F. H. Peterson,* for appellant.

James M. Witherow, for respondent.

LEWIS, J.

Plaintiff city is a municipal corporation, and defendant was the duly appointed, qualified, and acting chief of police for 1901 and 1902. February 20, 1902, defendant effected the arrest of one Allen Blood for a violation of a city ordinance. The following April 11 Blood commenced an action in the United States court against defendant to recover damages for false arrest and imprisonment. The cause was tried at the June, 1902, term of the United States District Court at Fargo, North Dakota, and defendant employed certain attorneys to represent and defend him at such trial. The city attorney of plaintiff corporation also appeared, by virtue of his office, and assisted in the defense. August 1 thereafter, the attorneys so employed rendered to defendant a bill for $300 for their services, which, together with a bill for disbursements necessarily incurred in the conduct of litigation, amounting to $90, he presented to plaintiff city, and on the following December 8 the common council duly allowed and paid the bill, and the money received by defendant was used by him in paying the attorney's fees and in reimbursing himself. After the bill was allowed and paid by the city, and within the time allowed by law, upon the request of seven taxpayers, the city attorney appealed from the decision of the council allowing the bill. The appeal having been perfected, defendant here served his complaint, which stated the facts substantially as above set forth. The complaint was demurred to upon the ground that it did not state facts sufficient to constitute a cause of action against plaintiff, and the demurrer was sustained.

The question presented upon this appeal is whether, under the facts disclosed, the council had authority to pay the bill for disbursements and attorney's fees incurred in defending its chief of police in an action brought against him to recover damages for false imprisonment while in the exercise, in good faith, of his official duties.

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The general welfare, good order, protection, and safety of the people of the city are among the specific duties imposed upon the common council to accomplish by appropriate legislation. In furtherance of this authority, city ordinances were passed for the prevention of crime, and it is made the duty of the chief of police to serve and execute warrants issued out of any justice court of the city, and to pursue and arrest any person charged with or who has committed any violation of any city ordinance; and he is constituted one of the conservators of the peace, with authority to command the peace, and in a summary manner suppress all riotous and disorderly proceedings. Unless expressly prohibited, the municipality possessed the general powers of a municipality at common law, and under the common law it was authorized to secure special legal assistance. Horn v. City of St. Paul, 80 Minn. 369, 83 N. W. 388.

We have been unable to discover any provisions in the city charter which either expressly or by implication are in conflict with the common-law power to employ such legal assistance. It is made the duty of the county attorney, when directed by the council, to appear and conduct the defense in any action against any officer or employee of the city on account of any act done by him in the performance of his official duties, but the common council is not limited to the services of such attorney. Sections 136 and 137 of the charter are provisions with reference to the letting of contracts to the lowest responsible bidder, and have no reference to and are not limitations upon the common council in regard to the subject here under consideration.

The law upon this question is well defined in Sherman v. Carr, 8 R. I. 431. In that case the mayor of the city was sued upon a charge of false imprisonment, and he made defense upon the ground that the acts complained of were committed by him in his capacity as mayor. A verdict having been recovered against the mayor, the common council made an appropriation to reimburse him, and a suit was brought by a taxpayer to enjoin payment of the same. The question before the court is stated thus: "Whether it is in the power of the city council to indemnify one of the officers of said city, who, performing the duties of his office in good faith, has exceeded the powers of that office, and thereby incurred damages at law?" The city charter prohibited officers of the municipality from doing or transacting any matters except

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such as belonged to the legitimate duties of a municipal body within its own province, or to vote money for any object for the regular, ordinary, and usual expenses of the city. The court held that it was one of the ordinary expenses of the city to protect its officers who in good faith exercised the functions of the office.

The court reasoned that it was in the interest of good government, and for the benefit of the city, that such power to indemnify should be exercised; that to hold an officer entirely responsible for his acts while in the performance of his official duties would naturally tend to make him overcautious, if not timid, to the detrimemnt of the public service. On the other hand, if such officer had the right to fall back upon the treasury of the city, there would be danger of his becoming reckless and overbearing in the exercise of the powers of his office. The court said: "It would seem, therefore, to be the wisest to leave the indemnification of the officer to the discretion of those who represent the interests of the city, that, on the one hand, they should not be without the power to indemnify a meritorious officer, acting in good faith, for the consequences of his conduct, and, on the other hand, they should not be obliged to protect every officer, though acting in good faith, under circumstances which seem to them to indicate a blamable want of care and caution."

Another interesting case is that of Cullen v. Town, 103 Ind. 196, 2 N. E. 571, where the marshal of the town arrested a person for an assault upon a peaceable citizen, and was sued for false imprisonment. The board of town trustees employed attorneys to defend the marshal in that action, which they successfully did. The town having refused to pay for the services, the attorneys brought an action to recover the same, and the defense was that the employment of the attorneys by the board of trustees was ultra vires. The court held that the town was bound by its contract, placing its decision upon the ground that one of the essential things in the enforcement of the laws is that the people shall have that respect for the constituted authorities that arises out of a common understanding that the laws will be rigidly executed—following the reasoning of the Rhode Island case.

Other cases bearing upon this subject are Fuller v. Inhabitants, 11 Gray, 340; Bancroft v. Inhabitants, 18 Pick. 566; State v. Council, 38 N. J. L. 430; Pike v. Middleton, 12 N. H. 278. Mr. Dillon, in the

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fourth edition of his work on Municipal Corporations (section 147), states the rule thus: "Where a municipal corporation has no interest in the event of a suit, or in the question involved in the case, * * * it cannot assume the defense of the suit, or appropriate its money to pay the judgment therein. * * * But such a corporation has power to indemnify its officers against liability which they may incur in the bona fide discharge of their duties, although the result may show that the officers have exceeded their legal authority." The authorities on this subject are collected under note 6, p. 1160, 20 Am. & Eng. Enc. (2d Ed.).

According to the facts stated in the complaint, the officer was acting in good faith in the discharge of his duties. Under the authorities above cited, not being prohibited by the charter, the city council had, in the first instance, authority to employ the attorneys, and enter into a contract with them for their compensation. Having such power, they could afterwards ratify that which they were originally authorized to do; and, when the bill for such services was presented to the common council, so far as appears from the facts set forth in the complaint, their action in allowing the bill must be treated as an intention to approve of their conduct, and accept the same for the benefit of the city.

It is not to be understood that what has been said is in conflict with the right of the taxpayers to have the proceedings reviewed upon appeal in the district court. We have merely determined the legal question that, as a matter of law, the city council had authority originally to make a contract with the attorneys for their compensation, and that, upon the facts stated in the complaint, their action in allowing the bill will be deemed to be an expression of approval and reimbursement.

Order reversed.

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GEORGE A. DU TOIT v. VILLAGE OF BELVIEW.[1]

January 20, 1905.

Nos. 14,155—(197).

Village Debt.

Chapter 257, p. 638, Laws 1895, authorizing certain villages to incur an indebtedness in the purchase of fire extinguishing apparatus, construed, and *held* not void for uncertainty.

Contract Valid.

Held, further, that the contract involved in this case, entered into under that statute, was not ultra vires and void because of the fact that the village and the town in which it is located constituted one district for purposes of taxation.

Action in the district court for Redwood county to recover $750 and interest upon certain village orders given by defendant in part payment for a chemical fire engine, which orders were thereafter assigned to plaintiff. The case was tried before Webber, J., who found in favor of plaintiff for the sum demanded. From a judgment entered pursuant to the findings, defendant appealed. Affirmed.

A. C. Dolliff, for appellant.

W. C. Odell, for respondent.

BROWN, J.

In 1898 the village council of the village of Belview, this state, being of the opinion that the public interests required better protection from fire than was then afforded by the facilities possessed by the village, purchased from Baldwin Bros., manufacturers and dealers in chemical fire engines, and other apparatus for extinguishing fires, a sixty-gallon steel chemical fire engine, for the agreed price of $850. The engine was thereafter duly delivered to the village, and it has since retained possession of the same. In payment of the purchase price, village orders were issued and delivered to Baldwin Bros., a number of which were thereafter assigned and transferred to this plaintiff, who is now the owner of the same. The orders were duly presented for pay-

[1] Reported in 102 N. W. 216.

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ment at their maturity, payment was refused, and plaintiff brought this action to recover thereon. Defendant interposed in defense that at the time the contract was entered into, by which the fire engine was purchased by defendant, the village of Belview was a joint election and assessment district with the town of Kintire, in which the village is situated, and that in consequence of this the village had no authority to enter into the contract, and the same was wholly ultra vires and void. The trial court found the facts substantially as stated, and ordered judgment for plaintiff, from which defendant appealed.

Two points are presented in this court: (1) Whether chapter 257, p. 638, Laws 1895, under which it is claimed the council acted in buying the fire engine, is void for uncertainty; and (2) if the act be valid, whether the village had power and authority under it to purchase the engine while it was a joint election and assessment district with the town of Kintire.

1. The act of the legislature above referred to is somewhat indefinite and uncertain. But irrespective of that act, the village council was authorized by subdivision 10, § 1224, G. S. 1894, to enter into the contract for the purchase of the fire engine. That statute confers power upon villages to "provide protection from fire by the purchase of fire engines and all necessary apparatus for the extinguishment of fires," and is ample to cover the case at bar. But while chapter 257, supra, is somewhat uncertain in its language, the liberal rules guiding the courts in construing legislative enactments warrant us in holding that it is not void for ambiguity. It expressly confers upon the council or trustees of villages power to purchase fire apparatus and appliances for the protection of the citizens of the village from fire. The portion of the act providing that the cost of the apparatus so purchased shall not exceed "the maximum amount named in such petition" may be rejected as surplusage, for the act has no reference to a petition being presented to the council for their action.

2. The second proposition made by appellant, viz., that the contract for the purchase of the fire engines was void and ultra vires because the village was a part of the same election and assessment district as the town of Kintire, does not require extended mention. Chapter 257 limits, it is true, the amount the village council may expend in the purchase of fire extinguishing apparatus to five per cent. of the assessed valuation

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as shown by the latest assessment roll of the real and personal property of the village; and the contention is that because the village and town were, for the purposes of taxation, one assessment district, there was no latest assessment roll of the real and personal property of the village by which the council could be guided in fixing the amount to be expended under the law. There is, however, no claim that the amount of the indebtedness created by this transaction exceeded the limit fixed by that statute, and, it not so appearing, the contract cannot be declared void. The territorial limits of the village were defined when created and organized, and the real and personal property located within those limits could easily be ascertained from the assessments returned by the town assessor.

The purpose of the legislature in fixing this limitation was to compel the village authorities to keep within due bounds and not incur an indebtedness beyond the ability of the municipality to meet, and the valuation of the property located within the village must be taken as the test in determining to what extent the council might incur a debt for fire extinguishing apparatus. The fact that the village was not a separate district for purposes of taxation, and that no separate levy of taxes upon village property to pay the debt could be made, does not render the contract beyond the power of the village council. The debt might be paid from funds in the village treasury acquired otherwise than by taxation. The village council was authorized to create the debt, and obstacles in the way of acquiring funds with which to pay the same concerned only the creditor. If he was willing to take his chances in that respect, the village ought not to complain.

We discover no reason for disagreeing with the trial court, and the judgment appealed from is affirmed.

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CHARLES H. MARR v. JAMES SHERRY.[1]

January 20, 1905.

Nos. 14,170—(211).

Summoning Jury.

Chapter 46, p. 54, Laws 1903, provides for the holding of a term of court on the fourth Monday of April and the first Monday in December of each year, and section 1 contains the following proviso: "Providing that no grand or petit jury shall be summoned for the April term of the year 1904, or for any April term thereafter, unless ordered by the court, as provided by law." *Held*, the discretion to summon a jury embraced the April term, 1904, as well as subsequent April terms.

Action in the district court for Benton county to recover from defendant $2,519.40, and interest, upon four promissory notes. The case was tried before Baxter, J., who directed a verdict in favor of plaintiff. From an order denying a motion for a new trial, defendant appealed. Affirmed.

Reynolds & Roeser and *C. C. McCarthy*, for appellant.

Stewart & Brower, for respondent.

LEWIS, J.

Prior to the enactment of chapter 46, p. 54, Laws 1903, the law provided for a term of court each year in Benton county, which convened in December. Section 1 of the new law reads:

> That the general terms of the district court in and for the county of Benton, in the Seventh judicial district, in said state of Minnesota, shall be held upon the fourth Monday of April and upon the first Monday of December in each year, providing that no grand or petit jury shall be summoned for the April term of the year 1904, or for any April term thereafter unless ordered by the court, as provided by law.

Pursuant to this section, upon order of the district court, a jury was called for the April term, 1904, and this action was regularly upon the jury calendar. At the call of the calendar, defendant moved the

[1] Reported in 102 N. W. 220.

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court to strike the case from the calendar of jury cases upon the ground that the law did not provide for the calling of a jury at that term. The motion was denied, the cause came on for trial, defendant declined to introduce any evidence upon the ground that the jury was improperly called, and a verdict was ordered for plaintiff. The trial court held that the proviso at the end of section 1, making the summoning of a petit jury discretionary, applied to the April term, 1904, as well as to all subsequent April terms, and the correctness of this construction is questioned.

This act was approved March 6, 1903, to be in force from and after its passage. Section 2 provided that the adjourned term of the district court, appointed to be held March 16, 1903, in Benton county, be adjourned until April 4, 1903, and a jury term was convened in December, 1903. While the language of the proviso is somewhat indefinite, we think it fairly appears that it was the legislative intent that the discretion to summon a jury embraced the April term of 1904, as well as subsequent April terms. It is true that this intent might have been more definitely expressed—as, for instance, providing that, unless ordered by the court, no grand or petit jury shall be summoned for the April terms. But having in mind the fact that the legislature in March, 1903, were enacting a law regulating the future control of judicial proceedings in Benton county, no reason occurs to us for prohibiting the submission of issues of fact to a jury at a term of court to be convened at a period more than one year in the future. It not appearing that there was any reason for limiting the power of the court, the language used in the proviso may fairly be held to express the intention to place the April term, 1904, on the same basis as the April terms of subsequent years. This is not a forced construction. It is in harmony with the general purpose to be accomplished, and our views are in accordance with those of the trial court.

Order affirmed.

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SARAH MONTGOMERY v. JOSEPH LEUWER and Others.[1]

January 20, 1905.

Nos. 14,171—(149).

Payment—Pleading and Proof.

Where an obligation requires a specific sum of money to be paid at a certain time, allegation and proof of payment is strictly a matter of defense, and does not impose on the party relying upon default or demand the duty of affirmatively showing those facts.

Appeal by defendants from an order of the district court for Scott county, Cadwell, J., denying a motion for a new trial. Affirmed.

F. C. Irwin, for appellants.

O. H. O'Neill, for respondent.

LOVELY, J.

This action was brought to recover rent claimed to be due on a frame building in the village of Belle Plaine, leased to the defendants for one year at the annual rental of $216, payable in quarterly instalments of $54 in advance. The complaint alleges the execution of a written lease in accordance with the terms above stated; also that defendants took possession thereunder; that plaintiff had performed the conditions thereof, but defendants had failed to pay the rent of the two last quarters of the year which had expired at the time the action was commenced. Defendant Leuwer answered, denying the allegations of the complaint and setting forth affirmative matter to show that the premises became uninhabitable, with specific averments of their character in that respect. Defendants Witt and Affolter denied the execution of the lease, or that they were indebted to the plaintiff in any sum.

The action was, by agreement, submitted to a referee to try and determine the same. On the trial of the cause, when reached before the referee, the plaintiff introduced the contract of lease, which sustained the allegations of the complaint, and then rested, without proof of de-

[1] Reported in 102 N. W. 367.

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mand or any default in the payment of the rental due from the defendants, or either of them, whereupon defendants moved to dismiss the action, which motion was denied; and, afterwards upon hearing in the district court, judgment was ordered in favor of the plaintiff for the amount demanded in the complaint. This appeal is from an order denying a motion to set aside the report of the referee, and refusing a new trial.

The execution of the lease set out in the complaint was established at the time it was offered in evidence; hence it would follow that the defendants would be liable for the whole amount of the rent to accrue under such lease, unless it had been paid, or plaintiff would be required to prove a demand or nonpayment, but this was affirmative matter of defense to be shown by defendants, and the burden to prove the same rested upon them. Where, under the terms of a written obligation, a specific sum of money becomes due and payable at a certain time, the production of such obligation establishes prima facie that the amount therein stipulated to be paid is due, and it is not incumbent on the person holding such obligation in the first instance to show either that demand has been made, or that there has been a failure to comply therewith. We think this is too firmly established on authority, as a question of pleading and proof, to now admit of any doubt. 9 Am. & Eng. Enc. (2d Ed.) 199; Romer v. Conter, 53 Minn. 171, 54 N. W. 1052; First Nat. Bank of Shakopee v. Strait, 71 Minn. 69, 73 N. W. 645; Marshall & Ilsley Bank v. Child, 76 Minn. 173, 177, 78 N. W. 1048.

It is practically conceded by defendants that this rule would apply, had the plaintiff claimed the whole amount due, but, having demanded only a part, a different rule should prevail. Upon a question of the construction of pleadings, and the inference that follows therefrom, it may be regarded as a legal as well as a mathematical rule in such cases that the greater includes the less; and, if the production of the lease was sufficient to show prima facie that the whole amount of rent was due, it would seem to be reasonable to conclude that the defendants had no right to complain.

Order affirmed.

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JOHN F. SCHICK v. H. C. SUTTLE.[1]

January 20, 1905.

Nos. 14,211—(180).

Counterclaim—Agent's Profit.

A claim on the part of a principal against his agent for a profit alleged to have been made by him in the course of his employment, founded on the rule of law that all such profits, whether resulting from the performance or a violation of the agent's duties, belong to the principal, may be interposed as a counterclaim in an action by the agent against the principal to recover for services rendered in a transaction other than that in which the profit was made.

Fraud of Agent.

If the profit was the result of a fraudulent violation of the agent's duties, the tort may be waived and a recovery had upon the counterclaim as upon an implied contract, or for money had and received.

Action in the district court for Jackson county to recover from defendant $1,350, as commission for services rendered in the sale of land, and $50 for money lent. Defendant interposed a counterclaim of $5,000 for money had and received by plaintiff to the use of defendant while acting as the latter's agent in the transaction out of which the commission arose. The case was tried before Quinn, J., and a jury, which, under instructions withdrawing from its consideration all evidence on the counterclaim, rendered a verdict in favor of plaintiff for $1,591.27. From an order denying a motion for a new trial, defendant appealed. Reversed.

Harold Harris and *L. F. Lammers,* for appellant.

Knox, Faber & Knox, for respondent.

BROWN, J.

This action was brought to recover a commission alleged to be due plaintiff for services rendered in the sale of certain land for defendant, and the sum of $50 loaned defendant at the time alleged in the complaint.

[1] Reported in 102 N. W. 217.

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Defendant admitted the right of plaintiff to recover in part for the commission claimed, but set up as a counterclaim the following facts: He alleged in his answer that in 1901 plaintiff was his agent for the sale of a certain three-story brick building owned by defendant in Chicago; that he was authorized by defendant to exchange the building for lands located in Minnesota; that at about the time stated, as such agent, plaintiff brought about and effected an exchange of the building for a farm known as the "Lockhart Farm," in Norman county, this state, which was owned by one John Grove; that in the exchange of said properties plaintiff received for defendant from Grove the sum of $5,000, for which he had failed and neglected to account, and judgment was demanded against plaintiff for that sum, less the amount he was entitled to recover under his complaint.

At the trial the court below, in its charge to the jury, withdrew from their consideration the evidence tending to prove the counterclaim, and directed them to disregard it. A verdict was returned for plaintiff, and defendant appealed from an order denying his motion for a new trial.

The only question for consideration in this court is whether the trial court erred in instructing the jury to disregard defendant's counterclaim.

The evidence on the part of defendant tends to show that he was the owner of the brick block in the city of Chicago, and was anxious to exchange the same for Minnesota farm lands; that in some negotiations with plaintiff, who had previously acted as defendant's agent in other real estate transactions, defendant engaged him to exchange the property for Minnesota lands; that subsequently plaintiff effected an exchange with Grove, as already stated, and received from the latter at least the sum of $3,000 in the transaction. Plaintiff, as the representative of defendant, had exclusive charge of the negotiations, and completed the exchange, if the evidence referred to be true, without communicating to defendant the precise terms upon which it had been made, and made a profit of at least $3,000. If the case stopped here, there would be no question of the right of defendant, as a matter of law, to recover the profits thus made. If plaintiff was the agent of defendant, as claimed, whatever profit he realized as a result of the transaction belonged to his principal. It is elementary, and a rule of universal

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application, that all profits and benefits accruing from the act of an agent, whether resulting from the performance or violation of his duty, belong to the principal, and not to the agent. Snell v. Goodlander, 90 Minn. 533, 97 N. W. 421; Smitz v. Leopold, 51 Minn. 455, 53 N. W. 719; Hobart v. Sherburne, 66 Minn. 171, 68 N. W. 841; Holmes v. Cathcart, 88 Minn. 213, 92 N. W. 956.

But the evidence on this subject is conflicting. That offered by plaintiff tended to show that whatever he received in the transaction was paid him for services rendered to Grove; that in negotiating the exchange of the properties in question he was the agent of Grove, and not of defendant. If plaintiff's claim in this respect be the truth—if he was in fact the agent of Grove, and not of defendant—the latter has no claim to the money received by him, and cannot recover on his counterclaim. But the different contentions of the parties in this respect presented a question for the jury to determine, and it was for them to say whether plaintiff represented and acted for defendant, or whether he was the agent of Grove. If he was the agent of defendant, it is clear that recovery may be had upon the counterclaim.

The theory of the trial court in withdrawing the counterclaim from the jury seems to have been that plaintiff was, under the evidence, acting in a double capacity as agent for both parties, and that his conduct amounted to a fraud upon the rights of defendant, for which no recovery can be had against him except in an action for tort, and that a tort is not a proper counterclaim in this action—one founded on contract. This position is clearly not sound. This action, it is true, is founded on contract, but the counterclaim, if defendant's contention as to the relations existing between the parties be true, arises also in contract. Plaintiff was the agent of defendant for the purpose of exchanging the properties, and that relation was contractual, and the profits made by plaintiff as such agent belonged to defendant, and are clearly the proper subject of counterclaim.

But, even if there was fraud on the part of plaintiff, so as to give defendant the right of action to recover damages, he could, at his election, waive the tort, and recover as upon implied contract, or for money had and received (McArthur v. Murphy, 74 Minn. 53, 76 N. W. 955; Downs v. Finnegan, 58 Minn. 112, 59 N. W. 981); and it was not necessary, to entitle him to so elect, that he specially plead all the facts

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in his answer. The case is wholly unlike McLane v. Kelly, 72 Minn. 395, 75 N. W. 601, and other like cases, where it is held, in cases of trespass upon real property, that the owner of the property cannot waive the tort and sue the trespasser for the value of the use of the premises as if he were a tenant. In such cases no contractual relations exist between the parties, and the law does not imply on the part of the trespasser a promise to pay the value of the use of the land during the period covered by his trespass.

Order reversed, and new trial granted.

E. DE FOREST BARNETT and Another v. JULIUS H. BLOCK.[1]

January 27, 1905.

Nos. 14,096—(107).

Contract—Consideration.

Where, upon the allegations of a complaint, it appears that an agent for the sale of lands entered into an agreement with a third party, whereby the latter promised to assist such agent in procuring and effecting a sale thereof for an agreed portion of the agent's commission, such promises must be regarded as mutual, each one furnishing a consideration for the other.

Misrepresentation by Agent.

Under such an agreement perfect good faith is demanded of both parties, and the subagent is prohibited from any misrepresentation to the landowner or his principal, for whom he is dealing, whereby the latter would be induced to surrender his rights, and for any benefits derived by such subagent from such misrepresentations he must account, and is liable in damages.

Appeal by defendant from an order of the district court for Ramsey county, Kelly, J., overruling a general demurrer to the complaint. Affirmed.

Harris Richardson, for appellant.

Humphrey Barton, for respondents.

[1] Reported in 102 N. W. 390.

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LOVELY, J.

This is an appeal from an order overruling a general demurrer to plaintiffs' complaint. In the disposition which must be made of this appeal it is only necessary to summarize from the somewhat involved and complicated allegations of the plaintiffs' pleading such material averments as, under the liberal rules required to be applied to its construction, would tend to disclose the existence of a cause of action.

It is substantially stated in the complaint: That the plaintiffs were the agents of A. D. Clarke & Company for the sale of upwards of one hundred twenty thousand acres of North Dakota lands. That on October 30, 1902, plaintiffs conducted oral negotiations with the Good Homes Land Company, a corporation, through the aid of defendant, who appears to have been its secretary, for the sale of this body of land at the agreed price of $4.50 per acre, that under the arrangement between Clarke & Company and plaintiffs the latter were to have for their commission whatever was received above $3.90 per acre. That the sale was to be procured and effected by means of a subsidiary agreement between the defendant and the plaintiffs, under the terms of which defendant was to receive for aiding in procuring the sale twenty cents per acre thereof for substantial assistance which he could and did promise to give to accomplish that result. That afterwards the defendant falsely represented to the plaintiffs that the Good Homes Land Company could not carry out the contemplated purchase of the land by reason of its inability to raise the necessary money therefor, and requested the plaintiffs to sign a release of the agreement for sale; and in furtherance of that purpose the defendant wrote a letter to A. D. Clarke & Company for the Good Homes Land Company, as its secretary, to the effect that the company was unable to complete the purchase, and asked that it be released from its agreement, and that all negotiations be canceled; he then obtained from plaintiffs a concurrence with the request in writing that the sale be canceled for the reasons stated in defendant's letter, when the negotiations terminated. The request by plaintiffs to Clarke & Company that the sale be canceled was secured by virtue of defendant's untruthful representations that the Good Homes Land Company would not make the purchase, and in reliance thereon by plaintiffs, who believed the same, and were misled thereby. That such representations were not only untrue, but, on the contrary, at the time the letter was

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written by defendant and concurred in by plaintiffs there was an alleged secret arrangement between the defendant and Clarke & Company whereby the sale should be consummated after these plaintiffs had been by such means led to abandon the same. That afterwards defendant made a direct deal with the corporation Clarke & Company for the Good Homes Land Company for the land, receiving as a profit directly to himself a large sum of money, of which, under the previous arrangement between plaintiffs and defendant, had it been carried out, plaintiffs' share of the result realized would have been over $7,000.

While it appears that the alleged negotiations between the plaintiffs and the Good Homes Land Company made through the defendant were oral, and could not be legally enforced under the statute of frauds, this defense could have been asserted, but might have been waived, and cannot be raised by third parties. Mott v. Ferguson, 92 Minn. 201, 99 N. W. 804. The essential gist of the action is not the liability of the land company, but the alleged misrepresentations of the defendant, whereby the negotiations for the sale which plaintiffs sought to make and defendant agreed to aid in procuring were defeated, and we have no doubt upon the allegations set forth in the complaint that it states a cause of action. There was a sufficient consideration for the agreement by which the defendant was to receive twenty cents per acre for his promise to aid in the procurement of the sale of the lands, which would have been recoverable had the sale been carried through.

The fact that the defendant was secretary of the Good Homes Land Company does not necessarily imply that he was acting against the interest of such company, or was prohibited from aiding and assisting in making the sale, or necessarily impute fraud upon the rights of the association. This is a matter between the defendant and the Good Homes Land Company, so far as the showing in the complaint goes. The promises of the plaintiffs, as agents of Clarke & Company, to defendant, and of the defendant to aid in effecting the sale to plaintiffs, furnished a sufficient consideration for the promise of each one for the other. 6 Am. & Eng. Enc. (2d Ed.) 727. Hence the utmost good faith was to be exercised by both in their reciprocal dealings. The inducements and representations by which the plaintiffs are claimed to have thrown up the contract are charged to have been intentionally

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false, and done to deprive plaintiffs of their commissions, which purpose, it is alleged, was successful, and for such damages as the plaintiffs may have sustained by reason of these representations they are entitled to compensation. It does not follow necessarily that the allegations of fraud are true because they are alleged. The defendant has challenged the sufficiency of the same by his demurrer, and for the purposes of disposing of this appeal they must be treated as true; but, whatever the facts may disclose upon the trial of the cause, there was sufficient set forth in the complaint to put the defendant upon a showing of his defense.

Order affirmed.

JOHN F. KELLY and Another v. LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY.[1]

January 27, 1905.

Nos. 14,120—(178).

Fire Insurance—Arbitration—Pleading.

The arbitration provided for by the Minnesota standard form of insurance policy in case the parties are unable to agree as to the amount of the loss thereunder is not a condition precedent to the right of action on the policy, unless a controversy between the parties as to the amount of the loss in fact exists; and it is unnecessary, in the absence of a controversy on that subject, to allege in the complaint in an action upon such a policy that an arbitration was or was not had, or was waived by the insurance company.

Action in the district court for Scott county to reform a policy of insurance issued by defendant company to plaintiffs' assignor, and to recover $1,500 thereon. From an order, Cadwell, J., overruling a general demurrer to the complaint, defendant appealed. Affirmed.

M. H. Boutelle, for appellant.

A bill or complaint, which asks the rectification of a mistake in a written contract and the enforcement of the instrument as reformed,

[1] Reported in 102 N. W. 380.

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states but one cause of action even though the enforcement of the contract involves matters purely cognizable in a court of law. 18 Enc. Pl. & Pr. 793; Pomeroy, Code Rem. (3d Ed.) § 459; Bliss, Code Pl. (3d Ed.) §§ 114–115; North v. Bradway, 9 Minn. 169 (183); Ham v. Johnson, 51 Minn. 105; Gooding v. McAlister, 9 How. Pr. 123.

The complaint fails to state facts sufficient to constitute a cause of action for reformation. The matter in which reformation is sought must appear to be material. 6 Wait, Pr. 169; 18 Enc. Pl. & Pr. 818; 24 Am. & Eng. Enc. (2d Ed.) 657.

The complaint does not state facts sufficient to constitute a cause of action for recovery. If arbitration be held a condition precedent, the general allegation of the complaint that the insured had duly performed each and every condition to be by them performed under the terms of the policy is insufficient to show a compliance with the condition or a waiver thereof. Mosness v. German American Ins. Co., 50 Minn. 341, 346. The standard form of policy makes no provision in the statement of loss required by its terms for the amount of loss or damage claimed by the assured. De Raiche v. Liverpool & L. & G. Ins. Co., 83 Minn. 398.

Arbitration is a condition precedent to recovery on a standard insurance policy. Schrepfer v. Rockford Ins. Co., 77 Minn. 291; Lamson v. Prudential, 171 Mass. 433; Flaherty v. Germania, 1 Weekly Notes Cas. (Pa.) 352; Reed v. Washington, 138 Mass. 572; Trott v. City Insurance Co., 1 Clif. (U. S.) 441; Levine v. Lancashire Ins. Co., 66 Minn. 138, 148; Carroll v. Girard, 72 Cal. 297; Adams v. South British, 70 Cal. 198; Fisher v. Merchants, 95 Me. 486; Westenhaver v. German-American, 113 Iowa, 726; Gasser v. Sun Fire Office, 42 Minn. 315.

If, upon consideration of the conflicting rulings, the court shall be of the opinion that arbitration is not a condition precedent, except upon the condition of a disagreement, the complaint in the case at bar is still defective. The allegation that said plaintiffs have duly demanded that said defendant pay them the sum of $1,500 for and on account of said loss and that said defendant has failed, neglected and refused to pay the same or any part thereof is clearly equivalent to an allegation of disagreement, in the absence of any qualifying statement that such refusal

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was based on a disclaimer of liability, in which latter respect the complaint is wholly silent.

Harris Richardson, for respondents.

Arbitration is not necessarily a condition precedent to an action upon an insurance policy in Minnesota. A disagreement upon the amount of the loss must first arise. Fletcher v. German-American Ins. Co., 79 Minn. 337. It is only the question as to the amount of the loss that is to be referred to the arbitrators. The complaint alleges that the policy was for $1,500. The complaint alleges that the property covered by the policy was totally destroyed; that it was worth $14,000, and that the amount of the loss was $14,000. The demurrer admits these facts. Thus it appears conclusively that even now there is no disagreement as to the amount of the loss. Arbitration in such a case is not required. Ohage v. Union Ins. Co., 82 Minn. 426.

As plaintiff did not plead a disagreement it will be necessary for the defendant first to plead that a disagreement arose between it and the insured as to the amount of the loss, without regard to what other disagreement may have arisen between them, before the claim can be made that the action was prematurely brought for want of arbitration. Until that occurs, the insured has nothing to arbitrate. If the insurer wishes to take advantage of the arbitration clause it must request arbitration. Sun v. Crist (Ky.) 39 S. W. 837; Davis v. Atlas, 16 Wash. 232; Kahnweiler v. Phenix Ins. Co., 67 Fed. 483; Phœnix v. Badger, 53 Wis. 283; Nurney v. Firemans, 63 Mich. 633; Wright v. Susquehanna, 110 Pa. St. 29; Wallace v. German-American Ins. Co., 41 Fed. 742; National v. Dwelling, 106 Mich. 236; Vangindertaelen v. Phenix, 82 Wis. 112; Grand Rapids v. Finn, 60 Oh. St. 513; Farnum v. Phenix, 83 Cal. 246.

BROWN, J.

Action to reform and recover upon a policy of fire insurance. Defendant interposed a general demurrer to the complaint, which was overruled by the trial court, and this appeal was taken.

The complaint sets out that on April 9, 1903, the defendant issued to one C. H. Grafenstadt a certain policy of fire insurance, for the sum of

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$1,500, upon his stock of goods and merchandise, consisting of dry goods, groceries, boots and shoes, etc.; that on October 11, 1903, the property, which is alleged to have been worth the sum of $14,000, was totally destroyed by fire; that thereafter, on October 13, Grafenstadt assigned the policy of insurance to the plaintiffs in this action, who are now the owners thereof. It further alleges that, by the contract entered into at the time the policy was issued, it was understood and agreed between the parties that Grafenstadt might place other insurance upon the same property, and that, by the mutual mistake of the parties, this understanding was not incorporated in the written policy. The relief demanded is that the policy be reformed and corrected, and made to conform to the agreement made at the time the contract was entered into, and that plaintiffs recover thereon the sum of $1,500, with interest—the amount of loss suffered.

It is urged by defendant that the complaint fails to state a cause of action, for two reasons: (1) That it does not allege that an arbitration between the parties has ever been had respecting the amount of the loss, as provided by the policy, or that an arbitration was waived by defendant; and (2) that it states no facts showing a necessity for a reformation of the policy.

1. The complaint states but one cause of action, and that to recover upon the policy, but, to entitle them to so recover, they seek to have the policy corrected and made to conform to the contract actually entered into between the parties. While it is true that the complaint discloses no particular necessity for correcting the policy, it might become necessary that it be reformed, depending upon the defense interposed by defendant. The policy, as written, provides that it shall be void if the insured had at the time it was issued, or should at any time thereafter procure, any other contract of insurance upon the same property without the consent of the company. The property covered by the policy is alleged to have been of the value of $14,000, and it is fair to assume that the owner did procure other insurance thereon. If the policy should not be corrected and made to conform to the contract actually entered into, the defense that other insurance was subsequently placed on the same property would be fatal to plaintiffs' right of recovery. No objection occurs to us why they may not anticipate that defense. Of course, if it is not made, there would be no occa-

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sion for the reformation or correction of the policy, and the court would not permit a waste of its time by a trial of the question.

2. The policy provides that:

> In case of loss, except of total loss on buildings, under the policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons, to be named by the other, and the third being selected by the two so chosen.

It is insisted by appellant that an arbitration of the amount of the loss is a condition precedent to the right of action on the policy, and that the complaint is defective, in that it contains no allegations showing that an arbitration was had, or that it was waived by defendant.

We do not concur in this contention. The question whether this condition of the policy renders an arbitration in case of loss a condition precedent to the right of recovery has been before the court in several actions, and by the later decisions it has been held that the provision for arbitration is not a condition precedent unless a controversy in fact exists between the parties as to the amount of the loss. In the case of Gasser v. Sun Fire Office, 42 Minn. 315, 44 N. W. 252, and also in Mosness v. German-American Ins. Co., 50 Minn. 341, 52 N. W. 932, it was, in substance, said that the provision of the policy referred to was a condition precedent to the right of action thereon. But in both those cases it affirmatively appeared that a controversy in fact existed between the parties as to the amount of the loss. In the case of Fletcher v. German-American Ins. Co., 79 Minn. 337, 82 N. W. 647, it was held that the arbitration provided for by the terms of the policy is not a condition precedent to the right of action upon the policy unless the parties actually disagree as to the amount of the loss. Until there is some controversy between them on that subject, there is no occasion for arbitration—there is nothing to arbitrate. The same was, in effect, also held in Ohage v. Union Ins. Co., 82 Minn. 426, 85 N. W. 212.

The question in the case at bar is one of pleading, and our attention has not been called to any case in this court directly bearing upon it. We think it should be answered adversely to defendant's contention. The right of arbitration provided for by the terms of the policy was

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intended for the benefit of both parties, and either may insist upon it if a dispute exists between them as to the amount of the loss. If there is in fact a controversy on that subject, and an arbitration is not had or waived by the insurance company, no recovery upon the policy can be had by the insured. Prima facie, however, the insured is entitled to recover the face value of his policy, and he may frame his complaint accordingly. If a controversy in fact exists as to the amount of the loss, the company may plead in its answer the failure to arbitrate the question, and thus defeat the action. The question whether a pleading should cover this particular feature in a case of this kind was presented in Davis v. Atlas, 16 Wash. 232, 47 Pac. 436, where it was held that it was unnecessary that the plaintiff expressly allege that an arbitration was or was not had, or was waived. See also Kahnweiler v. Phenix Ins. Co., 67 Fed. 483, 14 C. C. A. 485.

Order affirmed.

LEONHARD HAIDT v. SWIFT & COMPANY.[1]

January 27, 1905.

Nos. 14,136—(183).

Defective Appliances—Evidence.

In an action for injuries sustained by an employee who was required to stand upon a ladder and clean a vat at a packing house operated by the defendant, while performing this duty and supporting himself by a brace for his support it broke, causing plaintiff's fall and injury. *Held*, that the evidence in the record reasonably tends to support the following conclusions:

1. That the plaintiff was himself in the exercise of ordinary care.

2. That the master failed to supply plaintiff with a reasonably safe brace for his support when standing on the ladder, whereby his fall was occasioned.

3. That the instructions of the court properly submitted the duty and care of each of the parties relatively.

4. That the defendant's requests were properly refused.

[1] Reported in 102 N. W. 388.

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5. That the authenticated return of the settled "case," which was proposed by the defendant and properly certified by the trial judge as containing substantially all the material evidence in the case, must be treated as the basis of review in this court, and cannot be attacked directly on appeal by affidavits; following State v. Ronk, 91 Minn. 419.

Action in the district court for Dakota county to recover $2,000 for personal injuries. The case was tried before Crosby, J., and a jury, which rendered a verdict in favor of plaintiff for the sum demanded. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

O'Brien & Albrecht and *Price Wickersham,* for appellant.

Albert Schaller and *Otto Kueffner,* for respondent.

LOVELY, J.

Action for personal injuries sustained by an employee of defendant corporation through its alleged negligence in failing to furnish suitable instrumentalities for the work. At the close of the testimony there was a request for a directed verdict by defendant upon the ground that the evidence did not establish the negligence of the master, as well as upon the further ground that the evidence tended to show plaintiff contributed to his own injury and assumed the risks of the service. This motion was denied. When the cause was submitted to the jury by the court, a verdict was returned for plaintiff. The defendant thereafter served upon plaintiff's counsel a "case" purporting to contain the evidence, to which amendments were offered by plaintiff's counsel. Thereupon the trial court certified that such "case," containing one hundred fifty one pages of typewritten matter, had been examined, and found conformable to the truth, and to contain substantially all the material evidence offered or introduced at the trial of the cause, as well as the charge of the court and defendant's requests, whereupon defendant's counsel filed affidavits tending to show that testimony was received that was not included in the settled "case," and then moved for judgment in favor of defendant notwithstanding the verdict, or for a new trial in the alternative, which was denied. From this order defendant appeals.

It appears from the evidence that plaintiff had been for more than three years prior to his alleged injury an employee of defendant; that it was his duty to clean out the manure box or offal vat in the

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pressroom of defendant's packing house, and to remove therefrom accumulations of waste, fat, and scraps of animal flesh floating on the top of the water therein. The top of this box was at an elevation of about ten feet above the floor, and plaintiff, in performing his work, had to stand on a ladder made of rungs or cleats nailed to the box, and supported himself by holding to an arm or piece of timber which was fastened to the floor and thence attached to the corners of such box. Under the claims of the plaintiff the defendant negligently allowed the fastenings of this support to become unsafe, and in cleaning the offal box, while holding the same with his left hand, they broke and gave way, and he was precipitated to the floor and seriously injured.

An examination of the evidence in the settled "case" reasonably tends to support the claims of plaintiff, and we are also satisfied from the record that whether plaintiff exercised ordinary care, and whether upon his knowledge of the defects referred to, he assumed the risks of his employment, were also questions of fact, which were for the jury, and hence determined by the verdict.

The question which counsel regards as most serious and urges on this review with much force and earnestness affects the reliable accuracy of the settled "case," and arises from a remark made by the trial judge at the close of the evidence upon the request of defendant for a directed verdict, when the court said, after the argument for the directed verdict:

> From my want of knowledge as to what the plaintiff testified to because I am almost entirely without any knowledge upon that point, I shall let you go to the jury and discuss these questions.

It is now claimed that this statement of the court indicates clearly that the trial judge did not act advisedly in passing upon the alternative motion, and that defendant has been denied its constitutional right to a fair and impartial trial.

We cannot adopt the view that the "case" proposed by defendant as settled and certified by the court is not reliable by reason of the remark of the trial judge referred to. Without stopping to determine by what means the trial court reached the conclusion that the "case"

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contained substantially all the material evidence, we are controlled by the necessary conclusion that it did so, and for the purposes of this review we cannot consider the ex parte affidavits tending to show that there was other testimony actually received, or which in any way affects the strict accuracy of the return of the judge who presided at the trial. The authenticated return of the trial judge furnishes the veracious and conclusive return upon which we must act in this respect (State v. Ronk, 91 Minn. 419, 98 N. W. 334), and we cannot, as stated in this case, enter into an investigation upon affidavits of the verity of the return in that respect. It follows that we should not deny to the plaintiff, against the order of the trial judge sustaining the verdict, the benefits to which he is entitled. As pointed out in State v. Ronk, supra, the course which defendant's counsel seeks to pursue is contrary to all rules of procedure upon practice in error, and counsel, by offering the proposed settled "case" and accepting the certificate of the judge, reserves no right to be heard to attack it in this court upon the ground that it is not reliable.

While there may be a method by which a complaining party dissatisfied with a return of the evidence can have the same corrected, it must be done by the presiding magistrate; hence the course proposed on this review is not to be sanctioned, or the plaintiff deprived of his rights in the verdict by a showing upon affidavits that the trial judge did not hear portions of the evidence. This is a question of procedure, rather than of plaintiff's rights under the organic law, and neither the rules of orderly practice nor the presumption due to the verdict or to the return which the defendant himself sanctioned will permit of such an innovation.

An examination of the entire charge shows that upon every issue involved the trial court properly instructed the jury both upon the question of the assumption of the risk by the plaintiff and his alleged contributory negligence. The requests asked by the defendant were properly refused, since all correct rules applicable to the issues therein were embraced in the general charge.

Order affirmed.

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MINNESOTA DEBENTURE COMPANY v. RASMUS JOHNSON.[1]

January 27, 1905.

Nos. 14,140—(143).

Judgment.

A judgment is conclusive only against parties thereto and their privies. As to strangers, it is evidence only of its entry, and not of any fact on which it was based.

Who Is Privy by Estate.

To constitute one the privy by estate of another, it must appear that he succeeded after the bringing of the action by which he is sought to be concluded to an estate or interest held by the party to the judgment.

What Judgments Are Evidence Against All Persons.

The rule that a judgment is admissible in evidence against all the world, as a link in a party's chain of title, does not apply to all judgments. It applies more particularly to judgments in partition proceedings, probate decrees, actions to foreclose mortgages or liens, and to all judgments which operate proprio vigore to transfer title, or such as render valid a disclosed link, which, without the judgment, would be defective or invalid.

Other Judgments.

Such rule does not apply to ordinary judgments in actions to determine adverse claims, which do not purport to transfer title, or render valid an otherwise defective link in the chain of title.

Judgment not Competent Evidence of Title.

In an action in ejectment, plaintiff, to support its claim of ownership, traced title to the land in controversy from the general government to one George F. Dean, and, to show title in itself, offered in evidence a judgment in an action brought by it against Dean to determine adverse claims, in which action this defendant, who was at the time of its commencement, and when the judgment therein was rendered, in the actual possession of the land, was not a party; and it was not shown that he was the privy of Dean. The judgment did not purport to transfer the Dean title to plaintiff, nor render valid a disclosed defective link in the chain of title. It is *held* that the judgment was not competent evidence of title in plaintiff as against this defendant.

[1] Reported in 102 N. W. 381.

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Action in ejectment in the district court for Hennepin county. The case was tried before Harrison, J., and a jury, which rendered a verdict in favor of plaintiff for possession of the land and $200 for the detention thereof. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed and new trial granted.

Savage & Purdy, for appellant.

Tryon & Booth, for respondent.

BROWN, J.

Action in ejectment. The facts are as follows: To sustain the allegations of the complaint that plaintiff was the owner of the land in controversy, and entitled to its possession, plaintiff offered in evidence the record of a patent from the United States to one Moffett; the record of a deed from Moffett and wife to one Joseph Dean; the final decree of distribution of the probate court of Hennepin county in the matter of the estate of Joseph Dean, deceased, assigning and decreeing the property to William E. Dean and other heirs; the record of a deed from the heirs of Joseph Dean to George F. Dean; and a judgment in an action brought by this plaintiff against George F. Dean and others, entered on February 4, 1899—and rested its case. Whereupon defendant offered to prove that he was in the actual possession and occupancy of the property in question at the time of the commencement of the action in which the judgment just referred to was rendered, and has since that time continuously remained in the possession of the same. The offer was objected to by plaintiff, and the objection sustained by the trial court, unless defendant would disclose the nature of the title held by him. Defendant declined to include in his offer anything further than to show his actual possession of the land at the time of the commencement of the action referred to, and during its pendency, whereupon defendant rested his case, and the court instructed the jury to return a verdict for plaintiff. Defendant subsequently moved for a new trial, which the court denied, and he appealed.

The merits of the controversy respecting the title to the land are not now before the court. The question presented narrows down to whether plaintiff, by its evidence, made a case for recovery against defendant. The contention of plaintiff is that the judgment in the ac-

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tion against Dean established at least a prima facie title superior to the rights arising in defendant's favor from his possession of the land, while defendant insists that the Dean judgment is not evidence against him of any right or title in plaintiff, and that his actual possession at the time the judgment was rendered, and continuous occupancy since, are superior to any title shown to be in plaintiff. We think defendant's contention is technically correct, and that the trial court erred in excluding the offer to show his possession.

The action is one in ejectment, and plaintiff must recover, if at all, upon the strength of its own title, and not upon the weakness of that of defendant. The burden of proof in such actions is upon plaintiff, and defendant may "fold his arms and await the establishment of the plaintiff's title." 10 Am. & Eng. Enc. (2d Ed.) 532. If plaintiff fails in his proof of title, he cannot recover, however weak or defective defendant's title may be. Plaintiff's title in the case at bar is founded wholly upon the judgment against Dean. It does not exhibit any independent title, nor any right nor interest which the judgment converted into a title. It is clear that the judgment, unless it operated to transfer the Dean title to plaintiff, or is a link in the chain of title, is not evidence against defendant. The judgment was rendered in an action against Dean and others to determine adverse claims to the land, the complaint in which alleged that plaintiff was the owner of the property, and that defendant Dean and others claimed some right, title, or interest therein, and that such claim was wholly void and without foundation. While the action was brought against Dean and "all unknown parties claiming an interest in the land," the judgment rendered by the court was limited to the rights of defendants expressly named therein. It did not purport to adjudicate the rights of any unknown parties, and defendant was not bound thereby as an unknown party.

It is elementary that a judgment is conclusive only against the parties thereto and their privies. As to strangers, it is evidence only of its entry, and not of any fact on which it was based. Brown v. Kohout, 61 Minn. 113, 63 N. W. 248; Harper v. East Side Syndicate, 40 Minn. 381, 42 N. W. 86; Hartman v. Weiland, 36 Minn. 223, 30 N. W. 815; County of Olmsted v. Barber, 31 Minn. 256, 17 N. W. 473, 944. Defendant was not a party to that action, is not bound by it as such, and it does not appear that he holds possession of the land as a privy of

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Dean. To constitute one the privy of another in cases of this kind, it must appear that he succeeded, subsequent to the bringing of the action by which he is sought to be concluded, to an estate or interest held by the party to the judgment. 24 Am. & Eng. Enc. (2d Ed.) 746. In order that the judgment may be evidence against defendant as a privy of Dean, it must appear, therefore, that after the commencement of that action he succeeded to the title of Dean, or holds possession under or through him. Carroll v Goldschmidt, 83 Fed. 508, 27 C. C. A. 566; Blew v. Ritz, 82 Minn. 530, 85 N. W. 548. This does not appear, and, if it was a fact, the burden was upon plaintiff to show it.

But it is urged by plaintiff that the judgment amounted to a link in the chain of title; that it, in effect, operated to transfer the Dean title to plaintiff; and that, under the recording act, it was competent evidence, and superior to the rights of defendant arising from mere possession. The cases of Hall v. Sauntry, 72 Minn. 420, 75 N. W. 720, and Berryhill v. Smith, 59 Minn. 285, 61 N. W. 144, are relied upon to support the position. Neither case is, however, in point. The rule that a judgment is admissible in evidence against all the world as a link in a party's chain of title does not apply to all judgments. It applies more particularly to judgments in partition proceedings, probate decrees, actions to foreclose mortgages and liens, judgments for the recovery of money, which become liens upon the property and are enforced by execution—in fact, to judgments rendered in all actions, the object of which is to acquire a title held by the adverse party. All such actions, except those for the recovery of money, are in rem, strictly, and there can be no question as to the admissibility of judgments rendered therein as links in the chain of title. The proceedings to enforce the money judgment are in rem, and the judgment is admissible in connection therewith. But actions to determine adverse claims and to remove clouds from a title, while equitable in their nature, are not, strictly speaking, actions in rem, except, perhaps, where the relief demanded is a transfer of title. Shepherd v. Ware, 46 Minn. 174, 48 N. W. 773.

A judgment is admissible in evidence, therefore, as a link in the chain of title, only where it transfers title or renders valid a particular link, which without the judgment would be defective or invalid; and

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the particular link thus rendered valid must, as to a person not bound by the judgment, be shown.

Prior to statutory enactments changing the rule, a decree of a court of equity in actions of this kind, while declaring the equitable estate or interest of plaintiff to exist, did not operate by its own intrinsic force to vest in him the legal title to the property. The decree was not itself a title, nor did it, directly or indirectly, transfer the title from the defendant to the plaintiff. That rule has been changed and modified by statute. In many of the states the statutes declare expressly that such a decree shall operate to transfer the title of the land involved to plaintiff. In others, among which is our own state, the court is empowered by statute to so decree. 1 Pomeroy, Eq. Jur. § 428; 3 Pomeroy, Eq. Jur. § 1317; G. S. 1894, § 5864. By that statute the courts of this state are expressly empowered to pass title to land by judgment and decree where such relief is appropriate. But an ordinary judgment and decree quieting title to land, removing clouds, or determining adverse claims does not operate proprio vigore to vest or transfer title. Reed v. Reber, 62 Ill. 240. It can have that effect only when it so decrees in express terms.

The judgment relied upon by plaintiff in the case at bar does not purport to transfer the title of Dean to plaintiff, nor was that action brought for the purpose of acquiring that title. On the contrary, it was brought upon the expressly alleged claim that Dean had no title to the land, and for the purpose of extinguishing all title or claims of title held by him, and such was the relief granted by the judgment. It would be a departure from settled rules to hold that an ordinary judgment in an action to determine adverse claims to land, obtained by a total stranger to the title against a person appearing of record to be the owner, but who in fact was not, operates to transfer title, or constitutes a link in the chain of title, and is admissible in evidence as such against the true owner, who was not a party to nor bound by the judgment.

The judgment in the case of Berryhill v. Smith, supra, was rendered in an action to foreclose a mechanic's lien—an action purely and strictly in rem. Plaintiff there, by his action to foreclose the lien, connected himself with the title to the land; and the judgment, with subsequent proceedings thereunder, operated to transfer to him the

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title of the defendants in that action. Not so in the case at bar. For aught that appears in the record, plaintiff, at the time it commenced the action against Dean, was a total stranger to the title, for no evidence of title, lien upon, or interest in the property was exhibited or shown. Had it appeared that plaintiff's action was founded, in fact, upon some claim of title, and that the judgment of the court confirmed the same and extinguished the adverse claims of Dean, it would have connected itself with the title, and its judgment, under the recording act and the decision in the Berryhill v. Smith case, would constitute a link in the chain of title, and be prima facie superior to the actual possession of defendant, even though it did not appear that defendant was a privy of Dean.

The case of Hall v. Sauntry, supra, is clearly distinguishable. It appears from the record in that case that the government of the United States granted to one Pierre Paul the land in controversy. It appears further that there were two persons by the name of Pierre Paul, distinguished in the record as Pierre Paul, Sr., and Pierre Paul, Jr. Pierre Paul, Sr., conveyed the land to one Park, and Park, in turn, conveyed it to the Cloquet Lumber Company. The patent and both deeds were properly recorded. The Cloquet Lumber Company subsequently conveyed to one Rutledge, and Rutledge, in turn, to one William Sauntry. Neither the deed to Rutledge, nor the one from Rutledge to Sauntry, was recorded, and the land was vacant and unoccupied. With the title standing of record in the name of the Cloquet Lumber Company, though it had previously conveyed to Rutledge, Pierre Paul, Jr., claiming to be the patentee of the land, brought an action against the lumber company to determine adverse claims thereto. The lumber company answered, disclaiming any right or title; and judgment was ordered for the plaintiff—that he was the owner of the land, and that the lumber company had no estate or interest therein. Subsequently Paul, Jr., conveyed the land to Hall, plaintiff in the action of Hall v. Sauntry, supra. The deed was duly recorded. Sauntry claimed to own the land under his unrecorded deed, and Hall brought that action against him to determine adverse claims. The court held, on the facts stated, that the judgment recovered by Pierre Paul, Jr., against the Cloquet Lumber Company, was a link in the chain of title, and, as the defendant therein, Sauntry, acquired his title through the Cloquet

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Lumber Company, defendant in the Pierre Paul action, he held in privity with the company, was bound by the judgment, and could not impeach it collaterally.

It appears from the record that Pierre Paul, Jr., was not a total stranger to the title, but, on the contrary, that he claimed to be the original patentee, and that Pierre Paul, Sr., had no title or interest therein, and no right to convey the land to Park, through which conveyance the Cloquet Lumber Company acquired its title. It is true that the deed under which Sauntry claimed to own the land was executed prior to the commencement of the action in which the judgment was rendered, but it did not become operative or of force as to third parties until it was recorded, and the evidence shows that it was recorded subsequent to the entry of judgment. Sauntry was therefore a privy of the lumber company. In the case at bar, as has already been suggested, it does not appear whether defendant obtained whatever title he may have in the land in question through Dean, or that he holds possession in any way in privity with him. He was not, therefore, bound by the judgment under which plaintiff asserts title to the land. In order to render the judgment effective against him—he being in the actual possession of the land at the time it was rendered—the burden was upon plaintiff affirmatively to show that he holds the same under or through Dean, or exhibit the title or right upon which it obtained the judgment, and which was thereby confirmed.

It was urged by plaintiff that defendant is a mere squatter, occupying no better position than an ordinary trespasser, and is in no position to question the validity of plaintiff's title. According to the offer of evidence, he was in the actual possession of the land at the time plaintiff obtained its judgment, and is still in possession, which possession amounts in law to prima facie title. Mere possession has been held sufficient, upon which to maintain an action to determine adverse claims to real property. Child v. Morgan, 51 Minn. 116, 52 N. W. 1127. And if sufficient for that purpose, it is certainly available in defense in an action in ejectment against a plaintiff who produces no competent evidence of title against the person so in possession. Miller v. Blackett, 47 Fed. 547. As defendant was not a party to the judgment, nor bound thereby as a privy of Dean, his actual possession of the land was notice to plaintiff, at the time the action against Dean was com-

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menced, of whatever rights he possessed—equivalent to the record of a deed, if he had one—and he has the right to be heard upon the question, if there be one, of the validity of the title or right upon which plaintiff obtained the judgment.

It follows that the trial court erred in excluding the offer of defendant to show his actual possession of the land, and the order appealed from is reversed, and a new trial granted.

JOHN E. HOLT and Another v. PETER H. SIMS and Another.[1]

SAME v. PETER H. SIMS.

January 27, 1905.

Nos. 14,158—(205).

Sale—Implied Warranty.

The plaintiff furnished two heating plants to the purchasers, one for a bank building, another for a dwelling house, without an express warranty of their capacity. *Held*, that there was no implied warranty that the same would suitably or sufficiently heat the buildings for which they were furnished.

Vendor's Expression of Opinion.

A statement of opinion by the vendor of the capacity of an article furnished does not of itself constitute a warranty, nor impose an obligation to make it good.

Pleading—Intent to Deceive.

In order to show that statements and representations have misled and deceived a party in regard to the quality or character of an article sold, it is necessary to allege, as well as to establish by evidence, an intent to deceive, upon which the purchaser relies.

Performance of Contract.

Upon the showing that a heating plant of a better capacity than that agreed to be furnished was provided, *held*, that under the facts in this case it was a legal and substantial compliance with the contract therefor.

[1] Reported in 102 N. W. 886.

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Separate actions in the district court for Ramsey county by the same plaintiffs to recover respectively from defendants Peter H. Sims and wife the sum of $211.24, and from defendant Peter H. Sims the sum of $151, upon separate contracts for the installation of heating plants, and to foreclose mechanic's liens filed to secure the payment of said claims. The actions were tried together before Kelly, J., who found in each case in favor of plaintiffs. From separate orders respectively denying a motion for a new trial, defendants appealed. Orders affirmed.

Philip Gilbert, for appellants.

Harold Harris, for respondents.

LOVELY, J.

These appeals are from two orders denying motions for new trials, both reviewing cognate issues of similar character, brought here at the same time, and considered together.

Plaintiffs installed a heating apparatus in the dwelling house of defendants Peter H. Sims and wife at White Bear Lake, and also one in the bank building of the husband at the same place. The terms of the contracts under which these plants were installed are not disputed. They were embraced in proposals signed by the owners of the buildings, which were accepted by plaintiffs. As to the one for the dwelling house, plaintiffs were to install a hot-water heating plant therein, to consist of a No. 3 St. Paul boiler, with rated capacity of three hundred twenty five feet, to be set in the basement, with all necessary connections, and to fire up and test the job. For the bank building plaintiffs agreed to install a heating plant and to use therefor an old boiler then contained in the building, also to furnish all necessary pipings, fittings, valves, and labor to complete the job.

There are no further warranties expressed than contained in these accepted proposals. But it is insisted on the part of defendants that there was an implied warranty that the plant, when installed, would comfortably heat the rooms in the building when placed; or, in other words, would answer the intended purpose of defendants in purchasing the same. We are very clear that under the terms of the contract that no such implied warranty can be inferred or impressed upon its terms. The plants to be furnished were known to the defendants;

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their purposes were understood; their capacity for heating was open to investigation, which was presumably made by the purchaser; and it is nowhere disputed that such plants did in fact possess heating capacity, although not satisfactory to the desires and expectations of defendant. Under such circumstances it cannot be held that the sale of a heating apparatus to be placed in a building necessarily implies that it will heat such structure to any certain degree of temperature, or so as to render it sufficient in that respect. Cosgrove v. Bennett, 32 Minn. 371, 20 N. W. 359; Goulds v. Brophy, 42 Minn. 109, 43 N. W. 834. It was open to the defendants, if they desired specific results, to demand and obtain, if they could, an express warranty providing for the desired heating facilities, and their failure to require such terms in the contracts entered into precludes them from any complaint upon rules which are well settled and elementary.

Under assignments of error complaining of the exclusion of statements alleged to have been made to the defendants during negotiations for the instalment of the plants, it is now urged that such testimony would have tended to show that the defendants had been misled and were deceived thereby to their detriment and injury; that in fact a fraud was perpetrated upon them by leading them to believe that the heating capacity of the plants was greater than in practical results they turned out to be. The court properly excluded this testimony for the reason that under the issues presented by the answers the failure of the plants properly to heat the buildings, which was the gravamen of the defenses relied upon, embraced no definite or even general averments from which any inference of deceit could be drawn, or upon which it could be predicated. This was certainly an essential legal element of this defense, and should have been set forth to have justified the admission of this evidence. Humphrey v. Merriam, 32 Minn. 197, 20 N. W. 138; Bullitt v. Farrar, 42 Minn. 8, 43 N. W. 566; McKibbin v. Ellingson, 58 Minn. 205, 59 N. W. 1003. It appears from the memorandum of the trial court that this contention was not raised until the motion for a new trial, and we are not able to give it substantial effect upon this review.

The only remaining question we deem it necessary to pass upon is that in furnishing the heating apparatus for the dwelling house a No. 5 St. Paul boiler was furnished, instead of a No. 3, as specified in the

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terms of the contract. It appears that the plaintiffs were unable to obtain a No. 3 boiler, and the No. 5 St. Paul boiler furnished a better and greater heating capacity than the one provided for, and the court held this was a substantial compliance with the contract. It seems almost finical for the defendants to complain that their house was not well heated because the plaintiffs did not provide a suitable furnace upon the ground that the one furnished was really better in this respect than that which was named in the contract, and we are very clear that the ruling of the trial court that there was a substantial compliance with the contract must be sustained. This seems to us to be too obvious to admit of controversy, and fully sustained by the authorities. O'Dea v. City of Winona, 41 Minn. 424, 43 N. W. 97; Leeds v. Little, 42 Minn. 414, 44 N. W. 309; Madden v. Oestrich, 46 Minn. 538, 49 N. W. 301; Anderson v. Pringle, 79 Minn. 433, 82 N. W. 682.

Orders appealed from are both affirmed.

MANKATO MILLS COMPANY v. M. G. WILLARD.[1]

January 27, 1905.

Nos. 14,174—(103).

Contract of Indemnity.

The contract which is the subject-matter of this action construed. The findings of fact and decision of the trial court are sustained by the evidence.

Incompetent Evidence—Harmless Error.

Where issues of fact are tried by the court without a jury, and incompetent evidence is received, but the competent evidence is sufficient to support the findings of fact, and there is no reasonable ground for inferring from the character of the incompetent evidence that it was or might have been a material factor in the court's determination of the facts, the admission of such evidence is not reversible error.

[1] Reported in 102 N. W. 202.

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Appeal by defendant from an order of the district court for Blue Earth county, Lorin Cray, J., denying a motion for a new trial. Affirmed.

Thomas Hughes and *Pfau & Pfau,* for appellant.

A. E. Clark, for respondent.

START, C. J.

This is an action to recover damages from the defendant upon a written contract to indemnify the plaintiff, as it claims, against any loss it might sustain from the manufacture of certain hosiery covered by letters patent owned by the defendant, for which he was to be paid a royalty. The case was tried by the court without a jury, and as a conclusion of law from the facts found by the court judgment was ordered for the plaintiff and against the defendant in the sum of $2,316.34, with interest. The defendant appealed from the order denying his motion for a new trial.

The assignments of error are to the effect that the findings of fact and conclusions of law are not sustained by the evidence, and that the court erred in its rulings as to the admission of evidence.

A decision of the question whether the findings and decision of the trial court are sustained by the evidence depends largely upon the construction to be given to the contract. The contract recites that the defendant is the owner of a certain patent covering a device for the manufacture of a certain style of hosiery for the better protection of ankles from cold, known as "Warm Ankles." It then in express terms grants to the plaintiff the exclusive right to manufacture and sell this style of hosiery under the patent. This is followed by these provisions:

> And in consideration of such grant said company shall pay to said Willard a royalty of ten per cent. of the selling price of the various styles of "Warm Ankles" manufactured and sold on regular orders within two and one-half years from January 1st 1901, and a royalty of five per cent. thereof within the next two and one-half years thereafter. Such percentage is to be based on margins between cost and selling price as affected by fluctuations in cost of labor and raw materials, so that it shall

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not be materially above or below 50 per cent. of the net profit during said first two and one-half years. "Regular Orders" are understood to be such as are received from salesmen and by mail from territory that has been canvassed by salesmen. Any bad accounts, countermands, and returned goods on which royalties have been so allowed are to be charged back in proportion to the loss. All profits resulting otherwise than above are to belong to said company and it can use such letters patent and "Warm Ankles" in any business way it chooses.

It is understood that if the manufacture of said "Warm Ankles" shall become unprofitable said company may discontinue its manufacture but that all rights under this agreement shall cease at the same time. It is further agreed and understood that if there is any loss in disposing of any of the so-called "Warm Ankles" hosiery manufactured prior to January 1st 1901, or if it is necessary to sell any of said goods manufactured since that date and during the term of this contract at a loss in order to dispose of them said M. G. Willard shall assume same and that unsalable stock shall be charged to his account at cost of manufacture and material, but he is to have the option to take all such stock at such cost or let them be sold at a loss.

The provisions of the contract relating to the losses to be assumed by the defendant are somewhat obscure, but, if they be read with reference to the situation of the parties at the time the contract was made, and construed as a whole, their meaning is reasonably clear. The defendant was a stockholder and the superintendent of the plaintiff at the time the contract was made, and was the owner of the patent. He was anxious to have his corporation embark in the business of manufacturing and selling "Warm Ankles" under his patent, and to pay him a royalty therefor. He was the only practical hosiery man connected with the plaintiff's manufacturing plant, and seems to have been confident of the success of the proposed new enterprise, which would result in large profits to him from royalties; but some of the other directors of the plaintiff were doubtful as to its success. Under these circumstances business prudence and duty would suggest that

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the defendant should indemnify his corporation against loss if it undertook the experiment of manufacturing and advertising and selling "Warm Ankles" under his patent.

If we keep in mind the situation of the parties and the relation of the defendant to the plaintiff, and read and construe the contract as a whole, we have but little difficulty in ascertaining the intention of the parties thereto. The provision of the contract to the effect that bad debts, countermands of orders for goods, and goods returned, upon which royalties have been paid, shall be charged back in proportion to the loss, construed without reference to the provision which follows it, would seem to justify the claim of defendant that his liability could not, in any event, exceed the amount of royalties received by him. But when this provision is read and construed with the other provisions of the contract it is clear that it relates exclusively to an adjustment of the royalties to be paid to the defendant in case the enterprise proves to be a success. The provisions of the contract which follow this one deal with the contingency that the enterprise may not prove profitable, and fix the liability of the defendant in that event. The contract, as we construe it, provides, with reference to this matter, that, if the enterprise proves unprofitable, the plaintiff may discontinue the manufacture of the article covered by the defendant's patent; that, if there is a loss in disposing of any of the articles manufactured prior to January 1, 1901, or if it is necessary to sell any of them thereafter manufactured at a loss, the defendant shall assume such loss; and, further, that unsalable stock shall be charged to him at cost of material and of manufacture, subject to his option to take such stock at such cost or let it be sold at a loss.

Such was, in effect, the construction of the contract by the trial court. The court found, with others, substantially the following facts: The plaintiff proceeded to manufacture, sell, and offer to sell the hosiery pursuant to the contract during the years of 1901 and 1902, but because of the necessary cost and expense of the manufacture and sale thereof, and because the same were not marketable or salable, the plaintiff sustained a loss from the sale thereof; that such loss resulted from the fact that the cost of manufacture and sale of the hosiery was greater than the price for which the same were and could be sold, and such

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loss, including uncollectible debts and the reasonable cost of advertising such hosiery to induce purchases thereof, was the sum of $779.64. The enterprise was unprofitable, and for that reason the plaintiff January 1, 1903, discontinued the manufacture of the hosiery. On May 1, 1903, it had on hand hosiery so manufactured, which it was unable to sell, of the actual cost of $2,336.70 for labor and material entering into its manufacture. The defendant declined to exercise his option to take such hosiery at cost, and the plaintiff was obliged to and did sell it for $800, the best price obtainable therefor, whereby it sustained a further loss of $1,536.70. As a conclusion of law the trial court directed judgment for the plaintiff for the damages it had sustained. It is here urged by counsel for the defendant that the findings of fact and decision of the court are not justified by the terms of the contract or by the evidence. They are in accordance with the contract, as we construe it, and upon an examination of the competent evidence received on the trial we find that it is ample to sustain the findings of fact.

2. The trial court received in evidence, over the objection and exception of the defendant, some fifteen letters received by the plaintiff from its customers. This ruling of the court is assigned as error. The letters were prepared and sent out by the plaintiff after the commencement of the action, and consisted of questions as to the salableness of the hosiery, with blank places in which the customers wrote their answers. It is obvious that these letters were no part of the history or record of the plaintiff's business, and that they were obtained for the purpose of the trial, and to obviate the necessity of taking the depositions of the writers. The admission of the letters in evidence was error, for as to the defendant they were mere hearsay. But was it reversible error?

If the trial of the issues of fact had been by a jury, the admission of the incompetent evidence would have been reversible error, for the evidence related to a material issue, and, the court having admitted the evidence, the jury would have been bound to consider it. But this reason does not apply to cases where the issues of fact are tried by the court without a jury. Hence the rule is, where issues of fact are tried by the court without a jury, and incompetent evidence is admitted,

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but the competent evidence is sufficient to support the findings of fact, and there is no reasonable ground for inferring from the character of the incompetent evidence that it was or might have been a material factor in the court's determination of the facts, the admission of such evidence is not reversible error. 2 Enc. Pl. § Pr. 567; Hogan v. Vinje, 88 Minn. 499, 93 N. W. 523.

In the case of Lowry v. Harris, 12 Minn. 166 (255), the volume and character of the evidence improperly received was such as to afford reasonable grounds for inferring that it might have influenced the determination of the facts. The decision in the case of Farmers Union Ele. Co. v. Syndicate Ins. Co., 40 Minn. 155, 41 N. W. 548, seems to have been based upon the exceptional character of the incompetent evidence received; but, however this may be, we are satisfied that the doctrine of that case should not be extended.

In the case here under consideration there was sufficient competent evidence to support the finding of the trial court that the hosiery in question was unsalable within the meaning of the contract—that is, that it could not be sold at a profit; and, further, the character of the incompetent evidence does not fairly justify the inference that such evidence might have been a material factor in the determination of the facts in this case. Its admission, therefore, was not reversible error. We find no error in the record which will justify a reversal of the order appealed from.

Order affirmed.

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LEROY STEGNER v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY and Another.[1]

January 27, 1905.

Nos. 14,191—(203).

Open Gates at Railroad Crossing.

Open safety gates at a railroad street crossing are an implied assurance to a traveler upon the street that the tracks may be safely crossed. While such fact does not relieve him from exercising ordinary care before going upon the tracks, yet the fact must be taken into consideration in determining whether he exercised such care.

Contributory Negligence.

The question of the contributory negligence of the plaintiff's intestate in this case was one of fact.

Appeal by plaintiff from an order of the district court for Ramsey county, Bunn, J., denying a motion for a new trial. Reversed.

Samuel A. Anderson, for appellant.

F. W. Root, for respondents.

START, C. J.

Action to recover damages from the death of plaintiff's intestate, Jasper T. Stegner, who was killed by one of the defendant's engines at a street crossing in the city of Minneapolis on September 22, 1903, about nine o'clock in the evening. The trial court, on the defendant's motion, directed a verdict for it on the ground that the intestate was guilty of contributory negligence. The plaintiff appealed from an order denying his motion for a new trial.

The negligence of the defendant is not here contested; hence the sole question for our decision is whether the evidence, taking the most favorable view of it for the plaintiff, conclusively shows, as a matter of law, that the intestate was guilty of contributory negligence.

Evidence was given on the trial, although some of it was conflicting, tending to show: That the place of the accident was on the sidewalk

[1] Reported in 102 N. W. 205.

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on East Twenty-Fourth street, running east and west, in the city of Minneapolis, at a point where the street was crossed by the tracks of the defendant's railroad, five in number, running approximately north and south across the street. That this was a populous part of the city, and the street was much used day and night by pedestrians and teams. That the defendant was required by an ordinance of the city to maintain the usual safety gates at this crossing, and to keep a flagman there, and operate the gates from seven o'clock in the morning until midnight of each day. That the defendant erected such gates, but at the time of the accident it did not operate them after 7.30 o'clock in the evening, nor did it have a flagman at the crossing. That at the time of the accident two safety gates on each side of the tracks, with lighted lanterns at the top of each, were raised. That there was a large electric arc light burning, suspended in the middle of the street, fifteen feet west of the west track, and about fifteen feet high, lighting the crossing; but the night was dark, and it was difficult to see up the track north so as to discern an object more than from sixty to one hundred feet away. That, so far as known, the intestate was a stranger to the locus in quo, and was first seen about nine o'clock in the evening going east on the sidewalk, on the north side of the street, at a point on the first or westerly track. Whether he stopped and looked and listened before stepping on this track does not appear by any direct evidence, but he walked across the track, and before he stopped he looked up and down. He stopped on the third track, counting from the west. Just then a train coming from the south, running some ten miles an hour, on the fourth track, came upon the crossing. That the intestate stood on the third track, waiting for the train to pass, while a witness who saw him took twenty steps (a matter of some ten or fifteen seconds), when he was struck. That it was the noise made by the train, and the sight of it, that caused him to stop where he did, to avoid being hit by it. That, while so standing on the track, an engine coming from the north, and running backwards over the crossing, with no headlight on the end towards the intestate, struck and killed him. That this engine was running, without giving any signal or warning of its approach, at a rate of speed which carried it from eighty to one hundred feet after the intestate was hit. That the bell of the train coming from the south was ringing at the time. Further, by reason of obstruc-

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tions, the intestate could not see the approach of the train from the south until he was right at the crossing.

Assuming, for the purpose of this decision only, the facts which the evidence tends to establish, we are of the opinion that reasonable men might differ honestly as to the conclusions to be drawn from them as to the question of the contributory negligence of the intestate. Therefore we hold that it was a question of fact for the jury. It is quite clear that the question whether he was guilty of contributory negligence by reason of anything which he did or omitted to do after he was actually upon the crossing is one of fact, for he was then in a position of peril, whether he retraced his steps or stood still. He was then confronted with the emergency of two engines approaching the crossing from opposite directions at practically the same time. The time, place, and environment of the accident were well calculated to distract the attention of the intestate, and to disturb his judgment.

The pivotal question, then, is whether he was guilty of contributory negligence in going upon the crossing under the circumstances under which he did go. The raised safety gates are an important factor in the solution of this question. The intestate had a right to assume that, until his senses advised him to the contrary, the defendant had not negligently left the safety gates open, and also to assume that such raised gates were not false signals luring him into a death trap. Such gates were an implied assurance to him that the tracks upon the street might be safely crossed. While he was not relieved by this fact from exercising ordinary care before going upon the tracks, yet he was not required to exercise the same vigilance that would have been required of him if there had been no open gates. The fact that they were standing open must be taken into consideration in determining whether he exercised due care under the circumstances of this case. Woehrle v. Minnesota Transfer Ry. Co., 82 Minn. 165, 84 N. W. 791; Wilson v. New York, 18 R. I. 491, 29 Atl. 258; 2 Thompson, Neg. § 1613.

In the case last cited it is said: "The authorities are numerous, the only cases to the contrary that have come to our attention being cases in Pennsylvania, that open gates, or the absence of the usual signals of an approaching train or engine, are implied assurances that no train or engine is approaching the crossing with intent to cross the street, upon

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which travelers on the street have a right to rely, and that, if a traveler on the street be injured while crossing the railroad in such circumstances, the question whether he was guilty of contributory negligence is for the jury."

Now, it does not conclusively appear from the undisputed evidence in this case that the intestate, before he went upon the crossing, knew, or might have known by the exercise of ordinary care, that, notwithstanding the gates were open, a train was about to cross the street, for there is evidence tending to show that his view was obstructed until he got upon the crossing. Even if he might have heard a train coming, it cannot be held, as a matter of law, that he must have known that it was going to cross the street before the gates were closed. It follows that the question whether he failed to exercise ordinary care under the circumstances of this particular case, which the evidence tends to establish, was one of fact for the jury.

Order reversed and a new trial granted.

SWAN F. HJELM v. WESTERN GRANITE CONTRACTING COMPANY.[1]

January 27, 1905.

Nos. 14,199—(146).

Master and Servant.

The rule that a master cannot delegate to a servant the performance of his absolute duties, so as to relieve himself from the charge of negligence, applied to the facts of this case, and the evidence *held* sufficient to take the case to the jury.

Action in the district court for Stearns county to recover $10,113 for personal injuries. The case was tried before Searle, J., who directed a verdict in favor of defendant. From an order denying a motion for a new trial, plaintiff appealed. Reversed.

H. S. Locke, for appellant.

Reynolds & Roeser and *Stewart & Brower,* for respondent.

[1] Reported in 102 N. W. 384.

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BROWN, J.

Action to recover for personal injuries alleged to have been caused by the negligence of defendant. A verdict was directed for defendant in the court below, and plaintiff appealed from an order denying his motion for a new trial.

The facts are as follows: Defendant is a corporation engaged in operating a stone quarry, in connection with which, in the conduct of its business, it becomes necessary from time to time to blast the rock in the quarry, that it may be removed and worked into marketable condition. Plaintiff was employed by defendant in its quarry, and on the day in question a blast threw a large rock upon and injured his leg. As a basis to his right of recovery, plaintiff alleged in his complaint, in substance and effect, that it was the duty of defendant, before exploding any blast, to pack and cover the holes in the rock wherein the powder and dynamite were placed, so that no pieces or fragments would be shot or scattered over the quarry by the explosion; that, disregarding its duty in this respect, defendant wholly neglected to pack and cover the holes wherein the dynamite and powder were placed for the blast which resulted in plaintiff's injury, but that it "negligently, carelessly, and prematurely, and without giving plaintiff an opportunity to get a safe distance away from said blast," unskilfully exploded the same without covering or otherwise protecting the same; and that, by reason of such carelessness and negligence, plaintiff received his injury. The answer of defendant was, in substance, a general denial.

The complaint is not the best form, but respondent's counsel, in their brief, concede that it alleges two acts of negligence on the part of defendant, which it is claimed were the proximate cause of plaintiff's injury: (1) The failure of defendant properly to pack and cover the blast before explosion; and (2) exploding the same prematurely and without previous warning to plaintiff.

1. With respect to the first ground of negligence, it is clear that plaintiff has no cause of action. It appears from the evidence that he and one Freberg were in charge of the matter of exploding this particular blast. They placed the dynamite and powder in the drilled holes, and attended to all arrangements and details leading up to the explosion. Whether there was a custom or rule requiring the blast to be covered before explosion or not, the matter was within the control

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of plaintiff and his fellow laborer; and, if they exploded it without covering, they assumed whatever risks were incident thereto. It is true that the testimony tends to show that defendant's foreman stated to plaintiff and his associate that it was unnecessary to cover this particular blast, but this would not render defendant liable, for the reason already stated—that the matter was in the immediate control of plaintiff, and, if he exploded the blast without covering it, he is in no position to complain.

2. The second ground of negligence on which plaintiff claims a right of recovery presents a more serious question. As already stated, the explosion of this particular blast was under the control of plaintiff and one Freberg. All arrangements had been made by the attachment of an electric battery to explode the same, when a team was heard approaching the quarry, some distance away, whereupon Freberg, who, the evidence shows, had exclusive charge of the battery and explosion of the blast, directed plaintiff to go and warn the team away. This plaintiff did, and he testified that, when he was so directed by Freberg, he stated that when he had done so he would return to the place where the blast was to be exploded. While he was returning, and without notice or warning, the blast was exploded by Freberg, and resulted in a large rock striking plaintiff's leg and seriously injuring him.

It appears from the evidence that, according to a custom prevailing at the quarry, no blast was ever exploded without previously giving two distinct signals to enable the employees in the vicinity to seek a place of safety. Defendant's foreman, who was also president of defendant corporation, testified to the existence of the custom, and the evidence shows beyond controversy that it was not observed in this instance. Plaintiff insists that it was one of the absolute duties of the master to see that proper warning was given, and that, for the failure to give it in this case, defendant is liable; that defendant had clothed Freberg with full and exclusive authority to explode blasts at the quarry, and that in the matter of exploding the one resulting in plaintiff's injury he was a vice principal, and his failure to give the usual warning was the neglect of defendant. We think this contention is sound.

The question whether an employee stands in the relation of vice principal respecting his co-employees is not to be determined from the rank of his general service, nor by the question whether he has power

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to employ or discharge men, but rather from the nature of the employment in which he is engaged. If the nature of the employment involves the performance of some absolute duty the master owes his servants, the servant to whom is delegated the performance of that duty, whatever may be his rank, station, or title, is a vice principal, and his negligence is the negligence of the master. As remarked in Perras v. A. Booth & Co., 82 Minn. 191, 84 N. W. 739, 85 N. W. 179, if the employee or servant is clothed with special power and authority in the conduct of the master's business, in and about which is involved the absolute duty of the master to other servants with respect to the obligation to provide them with safe instrumentalities and a safe place in which to work, he is, with respect to such other employees, a vice principal, when engaged in the performance of the duties so involving the absolute obligations of the master. And as remarked by Judge Mitchell in Lindvall v. Woods, 41 Minn. 212, 42 N. W. 1020, the same employee may occupy the dual capacity of vice principal as to some matters, and of fellow servant as to others.

In the case at bar it is clear that, in the general or common employment of defendant, plaintiff and Freberg were fellow servants, and, unless the master owed plaintiff the duty to give proper signal before exploding the blast resulting in his injury, no recovery can be had. But it is clear to us that the duty existed, and that it was one of the absolute duties defendant owed plaintiff. The business in which defendant is engaged is, at best, exceedingly dangerous and hazardous. Explosions of the kind disclosed by the evidence naturally throw large quantities of broken rock in all directions, and it is reasonable to require the master to give proper warning to employees, that they may seek a place of safety. It is a business that required of defendant supervision and control, and, if no rule requiring such warning was ever adopted by defendant, the custom followed at the quarry answered the purpose of a rule, and the failure by Freberg to observe it was the failure of defendant.

The rule laid down in Carlson v. Northwestern Tel. Exch. Co., 63 Minn. 428, 65 N. W. 914, is applicable to the facts of this case. It was there said, in substance, that, while the employee assumes the ordinary and obvious dangers of the work or business in which he is engaged, the master is bound to use ordinary care to warn and protect

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him from unusual dangers and risks. If the nature and magnitude of the master's work, whether it be that of construction or otherwise, are such that the exercise of ordinary care for the safety and protection of the workmen from unnecessary dangers requires that they be given reasonable orders to protect them from dangers which are not obvious, the master must see to it that the orders are given. Considerations of justice and sound public policy impose this duty upon the master, as such, which he cannot delegate so as to relieve himself from the consequence of his neglect. See also Borgerson v. Cook Stone Co., 91 Minn. 91, 97 N. W. 734.

Freberg, in the case at bar, was engaged in exploding the blast. In and about the performance of that duty was involved the obligation of defendant to give timely warning to other employees in the vicinity. This was an absolute duty of the master, and it cannot shield itself by showing that the performance was delegated to one of the fellow servants of plaintiff. Freberg in this particular case stood in the place of defendant, and the latter was responsible for his failure to give the proper warning.

The contention is made that defendant was relieved from the consequence of a failure to give the usual warning in this particular instance by the conduct of plaintiff. It is urged in this connection that when plaintiff went to warn away the team approaching the quarry, and after having done so, he called to Freberg that the team was out of the way, and almost immediately thereafter the blast was exploded. While plaintiff testified that he did call to Freberg that the team was out of the way, he distinctly said that it was the understanding between himself and Freberg that, when he had succeeded in getting the team out of the way, he would return to Freberg, where the blast was to be exploded, and that at the time it was exploded he was running through the brush, on his return. If it appeared from the evidence that Freberg heard the call from plaintiff that the team was out of the way, and acted on it in exploding the blast, as an indication from plaintiff that he also was in a place of safey, plaintiff cannot recover. His own act would in such case bar his right of action. But there is no evidence that Freberg heard plaintiff's call, or that he acted on it in exploding the blast. He was not called as a witness at the trial, and, in view of the testimony of plaintiff to the effect that it was understood between

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them that he was to return after warning the team away, it was a fair question for the jury to determine whether Freberg heard the call, and acted on it, in exploding the blast, as an indication from plaintiff that he was in a place of safety. Our conclusion is that, upon this feature of the case, the evidence made a case for the consideration of the jury.

Order reversed and new trial granted.

FRANK ALEXANDER v. H. D. BAUER.[1]

January 27, 1905.

Nos. 14,218—(195).

Cutting Logs—Title.

Claim and delivery to recover several thousand feet of logs. Under the terms of a contract whereby defendant was to have until a certain time to cut and remove the same from plaintiff's land, a portion thereof were cut before the limitation provided for in the contract expired, but were not removed until six months afterwards. *Held:*

1. That upon the failure to remove the logs before the time limited, the title thereof did not revert to and become reinvested in the owner of the land.

2. That the title to the logs cut after the time limited was in the owner of the land, who might recover the same.

3. That the extent of the remedy in favor of the landowner for the logs cut within the limitation were such damages as he might have sustained by reason of the trespass and occupation of his land.

Appeal by defendant from an order of the district court for Hubbard county, McClenahan, J., denying a motion for a new trial. Reversed and remanded with instructions.

A. G. Broker, for appellant.

E. F. Crawford, for respondent.

[1] Reported in 102 N. W. 387.

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LOVELY, J.

Action in claim and delivery for the recovery of ninety five thousand feet of logs cut and skidded by defendant on the land of plaintiff in Hubbard county. The cause was tried to the court, who made findings of fact, holding that the plaintiff was the owner of the logs in question, and entitled to the possession thereof. Judgment was ordered accordingly.

Under the terms of the contract established in this case, one Koop acquired the right from the legal owners of the land described in the complaint to cut and remove the timber therefrom until June 1, 1902, which right was transferred March 8, 1902, to the defendant. It appears that ninety four thousand feet of these logs were cut before June 1, 1902, by defendant, the assignee of Koop; that afterward one thousand feet of logs were cut by the defendant; and that the whole thereof were removed from the land in the following December, some six months after the time specified by the terms of the contract.

Under the only assignment which we are required to consider on this review, there arises the construction of the terms of the contract authorizing the defendant to cut and remove the logs from the plaintiff's land within the time limited. The learned trial court was led to the conclusion that, under the weight of authority, the terms "cut and remove," in the contract, imposed upon the defendant the duty not only to cut the logs, but to remove the same, before the limitation expired, and that, upon his failure to do so, the title to all the logs severed from the soil reverted to the owner of the land, and the latter might recover the same. It is apparent from the memorandum opinion of the trial court that he was led to this conclusion partly by remarks in the case of King v. Merriman, 38 Minn. 47, 35 N. W. 570, where it is stated that in a very few cases, under these conditions, "if the timber be cut within the time, the property is in the vendee, although not removed within the limitation of the contract," and that "this doctrine would seem to be based upon the supposed hardships of such a case, rather than upon strict logic." The inference adopted by the learned judge who wrote the opinion in this case was not necessary to its decision, and, upon the view which we have taken, must be treated as dicta which should not control our present view.

Conceding, as necessary, that the case calls for a construction of the terms of the agreement, which provides that the defendant had a right

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to "cut and remove" until June 1, 1902, we are not able to adopt the view that this embraced a provision for forfeiture of defendant's acquired rights, whereby the title to the property was to depend absolutely upon the actual removal of the severed logs before that time. It cannot be doubted that the defendant's right to cut the logs was clear, and that he could avail himself of that privilege previous to the expiration of such limitation; but it does not conclusively follow that the character of the property was changed from personal chattels, the defendant's dominion over which, for the time at least, was plain and absolute, to an interest in real estate, nor that by the failure to remove it was to revert to and revest in the plaintiff. If this followed, the defendant would lose the benefit of his entire labor, as well as the right to that which for a period of time had remained in him, with all the benefits and incidents which attach to personal property.

It is true that there are decisions which, upon examination, will justify such conclusion—as, notably, the case of Boisaubin v. Reed, 2 Keyes, 323, and some other cases of similar import. We are not satisfied with the principles upon which these cases rest. It seems much more equitable and just, as well as consonant with the rights of the parties and the analogies of the law, to hold that as to standing timber, which is a part of the freehold, when cut under the authority of the owner and converted into chattel property, the ownership of which becomes vested in the person cutting the same, while the right to remove is limited to a certain time, there is no implied condition that such title shall revert if the independent duty to remove it is not strictly performed. Or in other words, that, by failure to perform the agreed duty to remove, the owner's rights would become absolutely and irrevocably forfeited. That there might be an action for trespass against the defendant upon the freehold, if the person cutting the logs should enter thereon after the limitation, may be true, or that damages for occupation of the land would follow from a removal after this time might also be true; but we are not prepared to approve any decision which holds that there is an implied condition upon which the right to the title to property, once vested, can be changed by the failure or breach thereof, and retransfer the title to the entire property.

We are better satisfied with the conclusions of the court in Irons v. Webb, 41 N. J. L. 203. Although we do not quite appreciate some of

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the distinctions made in that case, yet the result therein is in our view consistent with equity. A case more clearly in point, and, to our minds, more satisfactory to our views of natural justice, is that of Hoit v. Stratton, 54 N. H. 109, which is so nearly in point that we are quite willing to adopt the result, and approve the reasons upon which it is decided.

With reference to the one thousand feet of logs which were cut after the limitation in the contract, we think there is no doubt that the plaintiff was entitled to recover the same, and to that extent only is the finding of the learned trial court in this case sustained.

It is therefore ordered that the order denying a new trial be reversed, and the cause be remanded, with directions to amend the conclusions of law providing that judgment be ordered for the defendant for the possession of the ninety four thousand feet of logs cut before June 1, 1902, and for the plaintiff for the one thousand feet of logs cut after that date.

Order reversed.

STATE ex rel. HENRY SCHUMACHER v. GEORGE HAUSEWEDELL.[1]

January 27, 1905.

Nos. 14,250—(228).

Bastardy Proceeding.

Proceedings under the bastardy act, prosecuted by and on the complaint of the mother, are for her benefit as well as for the protection of the public. The court in such a case may make an allowance for the support of the child and other expenses to be paid to the mother, or for her use. State v. Zeitler, 35 Minn. 238, followed.

Settlement.

Section 15 of the act (G. S. 1894, § 2053) does not authorize the county commissioners to settle and release the mother's interest in such a case without her consent.

Appeal by relator from an order of the district court for Wabasha county, Snow, J., discharging a writ of habeas corpus and remanding relator to the custody of defendant as sheriff of that county. Affirmed.

[1] Reported in 102 N. W. 204.

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Henry W. Morgan, for appellant.
George H. Hammond and *Frank M. Wilson,* for respondent.

START, C. J.

This is an appeal by the relator from an order of the district court of the county of Wabasha refusing to discharge him on habeas corpus from the custody of the defendant, as sheriff.

The short facts are these: The relator was duly charged with the paternity of a bastard child on the complaint of its mother, an unmarried female. Such proceedings were had upon her complaint in the district court of the county of Wabasha that a verdict of guilty was returned into court by the jury on May 23, 1904. Before judgment on the verdict was entered, and on July 11, 1904, the relator deposited with the treasurer of the county of Wabasha the sum of $200 for the use and benefit of the county; and on the same day the county commissioners of the county, purporting to act by virtue of G. S. 1894, § 2053, adopted the following resolution:

> Resolved, that the sum of $200, which is deposited with the county treasurer of this county, the receipt whereof is hereby exhibited to us, is in full settlement of the case of State of Minnesota vs. Henry Schumacher, and that said Henry Schumacher is hereby discharged from the custody of the sheriff of this county, and his bondsmen are hereby discharged and released from their obligations as his bondsmen in said case.

Thereafter, and on August 6, 1904, the district court awarded judgment upon the verdict, whereby it was adjudged that the relator was the father of the child, and that he be charged with the maintenance thereof in the sum of $50 per annum, to be paid in quarterly instalments to the mother of the child, until such child reaches the age of fifteen years, or until otherwise ordered by the court, and, further, that within twenty days he give bond in the sum of $750, conditioned for the performance of the judgment. The relator failed to comply with any part of the judgment, and he was on December 12, 1904, by virtue thereof, committed to the jail of the county of Wabasha, there to remain until he complies with the judgment, or is discharged therefrom as provided by law. Thereupon he sued out a writ of habeas corpus.

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It is obvious from the facts stated that the relator is in custody by virtue of a final judgment of the district court; hence the only question that can be here considered is whether the court had jurisdiction to render the judgment. The court certainly had jurisdiction in the proceedings in bastardy, and rightfully exercised it—in any event, until the board of county commissioners passed the resolution here in question. It is, however, the contention of the relator that such action of the board ousted the court of its jurisdiction, and that the judgment thereafter entered upon the verdict is a nullity. We assume, for the purposes of this decision only, that the question of the validity of this judgment may be raised by habeas corpus.

The statute (section 2053) pursuant to which it is claimed that the board acted is in these words:

> The county commissioners before or after judgment in any case under this chapter may make such compromise and arrangement with the putative father of any bastard child in such county, relative to the support of such child as they deem equitable and just and thereupon may discharge such putative father from all liability for the support of such bastard.

This section undoubtedly authorizes the board to settle and compromise with the father as to his liability to the county for the support of the child. But does it authorize the board to settle and release him, without the mother's consent, from liability for the payment of such allowance for the support of the child and other expenses as the court may adjudge to be paid to her? This question is to be answered by reading and construing this section in connection with the other sections of G. S. 1894, c. 17, relating to bastards, of which it is a part. The father of a bastard child is not legally liable for its support, except as provided in this chapter. The mother, however, as an incident to her right to the custody and guardianship of such child, is liable for its support. State v. Nestaval, 72 Minn. 415, 75 N. W. 725. The statute recognizes this inequality, and, as some compensation therefor, provides, in certain cases, for a reasonable allowance for the support of the child, to be paid to the mother by the father. It provides for a settlement and release of the father's liability upon his paying, or securing the payment, to the mother of such sum of money or other property as she may agree to re-

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ceive, and the county commissioners approve. If, upon a trial in the district court, the accused is found guilty, the court must adjudge him to be the father of the child, and charge him with the maintenance thereof, in such sum and manner as the court may direct. The court may, and usually does, where the proceedings are instituted upon the complaint of the mother, direct such sum to be paid to her, which she may recover from the father by action, although he may have been discharged from custody upon taking the poor debtor's oath. The county commissioners, when the child is, or is liable to become, a public charge, may prosecute the father, for the protection of their county. G. S. 1894, §§ 2041, 2044, 2049, 2051.

The statutory provisions to which we have referred have been construed by this court, and it is now well settled that bastardy proceedings instituted by the mother, and on her complaint, are intended not merely to indemnify the public against expenses incurred in such cases, but for the protection and benefit of the mother, and the court may make a reasonable allowance for the support of the child, to be paid to the mother, or for her use. State v. Zeitler, 35 Minn. 238, 28 N. W. 501; State v. Dougher, 47 Minn. 436, 50 N. W. 475; State v. Nestaval, supra.

A consideration of the statutory provisions and decisions referred to leads to the conclusion, and we so hold, that the county commissioners may settle and compromise with the father, and discharge him from liability for the support of the child, without her consent, in any case not prosecuted by her, but they cannot, without her consent, make any settlement of her interests and claims in a case prosecuted by her upon her complaint. It is only by so construing section 2053 that effect can be given to the other provisions of the bastardy act. Any other construction would lead to gross injustice, and pernicious interference with the court in the administration of justice.

If the action of the county commissioners in this case had been taken after judgment, then, if the relator's contention be correct, we should have a case where the mother had prosecuted it to a final judgment, awarding her $50 a year for fifteen years, which she might enforce by execution or action, and the commissioners might, by a simple resolution, strike down her vested rights in consideration of $200 deposited with the county treasurer for the benefit of the county. Such would necessarily be the result if the section be construed as authorizing the

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settlement and release of the rights of the mother without her consent in a case prosecuted by her, for, whatever the commissioners may do before judgment, they may do after judgment. It is clear that the section in question was never intended to authorize any such arbitrary and unjust action by the commissioners. We therefore hold that the resolution of the commissioners, even if it could be construed as an attempt to release the rights of the mother in the action, did not oust the court of jurisdiction to make a reasonable allowance for the support of the relator's child, to be paid to her, or for her use.

Order affirmed.

L. H. PROCTOR and Another v. C. E. STEVENS LAND COMPANY.[1]

February 8, 1905.

Nos. 14,168—(199).

Breach of Executory Contract.

The vendee of an executory contract may recover, as for money received, the value of a stock of merchandise turned over to the vendor to apply upon the purchase price of land, upon a failure on the part of the vendor to comply with his agreement to convey.

Rescission by Vendee.

The facts stated in the complaint are sufficient to permit a recovery as for money had and received, although the ground of rescission alleged in the complaint is the fraudulent representations of the vendor as to his ownership of the land.

Findings.

The findings of fact are sustained by the evidence.

Action in the district court for Ramsey county to cancel on the ground of fraud a contract for the sale of land and to recover $5,500, the value of property delivered to defendant on account of the purchase price stipulated in the contract. The case was tried before Orr, J., who found in favor of plaintiff for the sum demanded. From a

[1] Reported in 102 N. W. 395.

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judgment entered pursuant to the findings, defendant appealed. Affirmed.

A. A. Miller, Martin O'Brien, and *Frank H. Ewing,* for appellant.
Sheehan & Keefe, W. E. Dodge, and *V. W. Dodge,* for respondents.

LEWIS, J.

August 22, 1902, plaintiffs and defendant land company entered into a contract in writing in part as follows:

> This duplicate contract and agreement, for the sale of land, made and entered into this 22nd day of August, A. D. 1902, by and between the C. E. Stevens Land Company, of Crookston, Minn., party of the first part, and L. H. Proctor and W. H. Davis, of Nevada, Iowa, parties of the second part: Witnesseth: That the party of the first part has this day sold unto the parties of the second part all of section 33, in township 154 north, of range 46 west, at the agreed price of $22.50 per acre, making a total consideration, $14,400.

It was further agreed that the second parties were to turn over to defendant a stock of general merchandise located at Nevada, Iowa, to be invoiced at wholesale prices and five per cent. added. As a further payment the second parties were to execute a first mortgage upon the land purchased, to be negotiated by the first party, if the second parties should so elect, such mortgage to be for the amount of $5,000 or more, if it could be obtained, and, if negotiated, the amount received to be paid the first party upon the purchase price, and the remainder of the consideration to be paid in four promissory notes due in one, two, three, and four years. Seven days later, August 29, another agreement was entered into, in part as follows:

> Witnesseth: That whereas, C. E. Stevens Land Co. has sold unto L. H. Proctor and W. H. Davis certain land in Polk county, Minn. * * * said land being sold on contract to the C. E. Stevens Land Co., and it being understood that the C. E. Stevens Land Co. holds title to said land by contract issued thereon by the St. Paul, Minneapolis & Manitoba Railroad Co., it is hereby provided that ninety days time is to be given for the placing of a certain loan provided for by the original contract

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> * * * and the delivery of title papers in the form of deed to L. H. Proctor and W. H. Davis is to be made within ninety days from this date, providing such loan is placed. If such loan is not placed and title papers not delivered in ninety days from this date, the C. E. Stevens Land Co. agree to assign unto L. H. Proctor and W. H. Davis the four certain railroad contracts issued by the St. Paul, Minneapolis & Manitoba Railroad Co., the said contract conveying title to the northeast quarter, northwest quarter, the southwest and the southeast quarter, respectively, of section 33—154—46. It being the intent of this instrument to provide for the assignment of the railroad contracts above referred to but in no respect is this contract to change the terms of the original contract. * * *

There was attached to the contract a memorandum, as follows:

> And pending the placing of such loan the C. E. Stevens Land Co. hereby assign four certain railroad contracts issued by the St. Paul, Minneapolis & Manitoba Railroad Co., covering the land described, unto L. H. Proctor and W. H. Davis.

In pursuance of this agreement plaintiffs turned over to defendant the stock of merchandise, but, not having received a conveyance of the premises, according to the terms of the contract, this action was commenced to recover the value of the stock of goods, with interest, upon the theory that defendant fraudulently represented, when the contract was executed, that it was owner of the premises, and falsely pretended to sell and convey to plaintiffs the same when it had no title thereto, and that, relying upon such representations, plaintiffs executed their part of the agreement, and delivered the stock of goods.

The court found the contract to have been executed as above set forth, and further found that the four certain land contracts covering the premises in question had originally been issued by the railroad company to one F. L. Maytag; that such contracts were not, by their terms, assignable, except by the consent and approval of the railroad company and the land commissioner, duly indorsed thereon; that, although Maytag assigned the contracts to defendant company, the necessary consent was never obtained; that defendant never owned the contracts, either as assigned or otherwise, and never owned or possessed any

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right, title, or interest in or to the land. The court also found that plaintiffs had never received any consideration for their stock of goods so transferred; that demand for full performance of the agreement was duly served by plaintiffs upon defendant, and that plaintiffs were ready and willing to perform their part upon receipt of the title papers to the land; that November 16, 1903, plaintiffs duly served a written notice rescinding the contracts and demanding a repayment of the value of the goods, amounting to $5,500, which was refused. The court further found that the four railroad contracts issued to Maytag were defaulted for nonpayment of the purchase price, and that defendant had notice thereof.

At the time of the execution of the supplemental contract plaintiffs were informed of the fact that title to the land in question was to be derived from the railway company by means of four certain railway land contracts, and, although the attached memorandum would indicate the contracts were intended to be assigned to plaintiffs at the time the duplicate contract was entered into, there is no evidence that plaintiffs ever saw the original contracts, or knew they had originally been issued to Maytag. So far as the record shows, plaintiffs relied upon the written agreements to the effect that the railway contracts were issued directly to defendant land company. It would be immaterial whether defendant derived its title through such railway land contracts directly from the railway company, or by means of proper assignments from the original purchaser, if they, in fact, acquired title.

At the trial defendant took the position that it had complied with its obligation, had secured proper assignments of the land contracts from Maytag, and was in position to tender a proper title at any time plaintiffs would carry out their part of the agreement, viz., to execute and deliver the mortgages therein set forth. The court found that the assignments which defendant held from Maytag were not valid for the reason that they had not been approved by the land commissioners. This point would seem to be fatal to defendant's position, but, waiving that, there is another finding to the effect that these very contracts had been canceled on account of default in payment of the purchase price, and for that reason defendant had no right, title, or interest in the premises. This finding is assigned as error, it being claimed that the contracts had been reinstated. While reinstated, we find no evi-

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dence as to the time, or that it was for defendant's benefit. The finding of the court is sustained by the evidence.

It having been established that defendant, at the time of executing the original contract, had no title and had no interest whatever in the premises at the time of executing the supplemental contract, and it appearing that at no time thereafter, up to the rescinding of the contract, did defendant acquire any right, title, or interest to the land, defendant was in default, having failed to perform its part of the agreement, and therefore was not in position to call upon plaintiffs to make a tender of the mortgages. It is found that plaintiffs were at all times ready and willing to perform their part of the agreement upon being furnished with proof of title in defendant, and this finding is supported by the evidence.

The mortgages were to be given as part payment of the purchase price, and, assuming that plaintiffs had elected to permit defendant to negotiate the $5,000 mortgage and apply the proceeds upon the purchase, the contract did not provide that such mortgage should be executed and delivered in advance upon the railroad land, whether or not defendant had any title. There is no evidence to the effect that plaintiffs so understood the agreement, or acted with that understanding of the facts.

The question of fraud is immaterial in this case in determining the rights of the parties. Conceding that defendant was acting in good faith, and expecting to perfect title, plaintiffs were entitled to recover what they advanced as money had and received, and the complaint is comprehensive enough for that purpose. Taylor v. Read, 19 Minn. 317 (372); Herrick v. Newell, 49 Minn. 198, 51 N. W. 819; Kicks v. State Bank, 12 N. D. 576, 98 N. W. 408.

Judgment affirmed.

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W. H. MERRILL v. WILLARD C. PIKE and Another.[1]

February 3, 1905.

Nos. 14,176, 14,177—(164).

Master and Servant—Evidence.

During the construction of a building the foreman directed a temporary floor to be laid for the purpose of furnishing a place for the workmen to stand on in adjusting posts, girders, and joists for the floor above. Plaintiff, a common laborer, was injured by falling through a hole in the floor while assisting in placing a floor joist.

Held: The evidence presented the following questions of fact, and the verdict of the jury is supported by the evidence:

1. That defendant was negligent in leaving the hole in the floor unguarded, and in not notifying the workmen of its existence.

2. Plaintiff was not guilty of contributory negligence in his method of handling the joist, and did not assume the risk of working upon the imperfect floor.

3. Plaintiff made settlement with defendants for $75, and executed a release of all claims against them, but the same was done while plaintiff was under the influence of intoxicants, and had no knowledge of the fact that he had executed such release until service of the answer in the case.

Action in the district court for Hennepin county to recover $20,900 for personal injuries. The case was tried before Willard R. Cray, J., and a jury, which rendered a verdict in favor of plaintiff for $2,000. Defendant moved for judgment notwithstanding the verdict or for a new trial, and from an order granting the motion for a new trial and denying the motion for judgment notwithstanding the verdict, plaintiff and defendants respectively appealed. Reversed on plaintiff's appeal and judgment ordered for plaintiff on the verdict, less $75. Affirmed on defendants' appeal.

Welch, Hayne & Hubachek, for plaintiff.

Koon, Whelan & Bennett, for defendants.

[1] Reported in 102 N. W. 393.

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LEWIS, J.

Plaintiff was injured by falling through a hole in the second floor of a building where he was at work assisting in placing a joist for the third-story floor. The trial resulted in a verdict of $2,000 for plaintiff, and appeal was taken by defendants from an order of the court refusing their motion for judgment notwithstanding the verdict, and by plaintiff from the order granting a new trial.

1. The construction of the building was under the direction of a foreman. The second floor was made by laying two-inch planks upon joists permanently placed, and the object of this temporary floor was to provide a place to work on while setting up posts, girders, and joists for the floor above. While there was no attempt to make a permanent floor, there were no large or easily observed openings, except the hatchway for the raising of material, and possibly the hole through which plaintiff fell. It is admitted that plaintiff was not an experienced workman, but was employed as a common laborer or helper, having worked upon and about this building five or six weeks, principally in bringing material from the outside of the building and hoisting it to the proper place. Plaintiff admitted he had helped place the iron posts for the second floor, but denies having had anything to do with laying the floor. Upon the occasion of his injuries plaintiff was directed by the foreman to go, with three other men, on the second floor, and put in place a pile of joists that had been hoisted through the hatchway and piled upon the girders of the third floor. According to plaintiff's recital of the accident, he, with another man, remained on the second floor, while two men were upon the pile of joists on the third floor, it being the intention to put in position the first joist of a certain bent, one end upon the girder and the other upon the brick wall. In doing so they used a wooden horse, and in receiving the joist from the men above plaintiff and his fellow workman attempted to guide one end of it by means of boards, when the timber slipped and fell to the second floor, and, in order to avoid it, plaintiff jumped backward, and a little to one side, falling through a hole about three feet square.

Defendants' negligence in this case depends upon whether the floor in question, upon which plaintiff was working, was an instrumentality or place required by them to be in a reasonably safe condition. If plaintiff, in connection with the other workmen, was engaged in pursuing a

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general enterprise, and assisted in laying the floor, then he cannot recover, for the reasons, first, that he would be constituted a fellow servant; and, second, that he would be presumed to have knowledge of the condition of the floor, and hence responsible for the same. There is a sharp conflict in the testimony between plaintiff and the foreman on this point, and in disposing of this question we are obliged to assume that the jury accepted plaintiff's version of the story. Plaintiff was not a carpenter, but only a common laborer, directed here and there to assist in handling heavy materials; and, if his explanation of the accident be accepted, he had a right to assume that the floor had been properly laid, and afforded reasonable safety to those directed to go upon it. From this point of view, plaintiff was not required to accept the risk of falling through such hole upon the ground that it was one of the risks incident to his work.

It is true that not so high a degree of care will be exacted from a master in the construction of a building as is ordinarily required in the furnishing of a place or instrumentality for his laborers, but the work of construction may be so arranged and divided as to require the master to exercise the same degree of care as though the building or instrumentality had been completed. As in this instance, if plaintiff took no part in the laying of the floor, had no knowledge of its exact condition, and it appeared to him, as he went upon it, to be perfectly safe, he was justified in assuming that the master had performed towards him the duty of seeing that the place he was called to go upon was reasonably safe for the purposes of his work. The testimony does not disclose why the opening was left in the floor, and there is nothing to indicate that plaintiff had knowledge of it, or would have observed it in going to the place directed. From the evidence upon this point we think it was a question for the jury to determine whether or not defendants were guilty of negligence in leaving the opening. In this respect we think the case is governed by Bloomquist v. Chicago, M. & St. P. Ry. Co., 60 Minn. 426, 62 N. W. 818; Sims v. American Steel Barge Co., 56 Minn. 68, 57 N. W. 322; and is clearly distinguishable from the cases relied upon by appellants, Holloran v. Union, 133 Mo. 470, 35 S. W. 260; Beique v. Hosmer, 169 Mass. 541, 48 N. E. 338. A case quite similar to the one now under consideration, wherein the master was held liable, is Johnson v. Tacoma, 22 Wash. 88, 60 Pac. 53.

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2. The method adopted by plaintiff and his co-laborers in handling and adjusting the timber is not so inherently indicative of negligence as to charge plaintiff with contributory negligence. None of the men were trained builders, but were directed to do that particular work, and, if they used the means which to men of their experience appeared to be a proper method, it cannot be said, as a matter of law, that they were guilty of negligence simply because more experienced workmen would have adopted a different method. This, too, was a question of fact properly submitted to the jury.

3. As a defense it was alleged that in consideration of $75 plaintiff fully released defendants from all claims and liabilities growing out of the action. For reply to this defense plaintiff denied that he had compromised this claim for $75, and alleged that during the time the compromise is claimed to have been made and the release executed he had been addicted to the use of intoxicants in excess, and was wholly incapacitated for the transaction of any business, and that at the time of making the alleged settlement he was not able to comprehend the nature of any business transaction whatever, nor had he any knowledge that such compromise had been effected. He alleged further that while in such condition he had been given a sum of money by some insurance company for the payment of expenses connected with his illness, but that he was unable to remember or understand the nature of the transaction, and that the persons who paid him the money well knew of his unfit condition to comprehend the nature of the transaction. Evidence was introduced tending to show that while confined to the house on account of his injuries plaintiff was given stimulants, and, after getting about, that he was almost constantly under the influence of intoxicants. He denied any knowledge of having executed the release, but admitted that he may have received some money, claiming it to have been paid on account of expenses; and claimed that prior to the commencement of this action he had no knowledge of having executed a release.

On the other hand, there was evidence to the effect that at times, at least, he was in his rational mind, and during such periods admitted signing the contract of settlement for $75. We have examined this evidence, and are of the opinion that it was not of such decisive character as to require us to hold, as a matter of law, that plaintiff was in possession of his senses, and knew what he was doing, when executing the

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release, or that he was afterwards informed of the fact, but retained the money, and did not repudiate the contract of settlement. While the evidence does not tend to show that defendants, or their representatives, the insurance agents, deliberately led plaintiff into a trap for the purpose of securing a release of his claim while in a weak state of mind, yet the evidence does indicate that they knew his condition, and had reasonable cause to believe him unfit for any business transaction. Under such circumstances, if true, the contract was voidable, though not void, and, conceding that plaintiff was required within reasonable time after discovery of the fact that he had signed away his right for $75 to repudiate such contract and return the money, yet the case was not tried nor submitted by defendants upon the theory that the evidence was contradictory and presented a question of fact for the determination of the jury. On the contrary, defendants submitted their cause upon the theory that it conclusively appeared, as a matter of law, that plaintiff knowingly and deliberately made the settlement and ratified the contract by retaining the money.

The trial court denied defendants' motion for judgment notwithstanding the verdict and granted its motion for a new trial, but failed to state upon what ground its order was placed. The evidence reasonably tends to support the verdict, and, unless errors appear in the rulings of the court or in the charge to the jury, the order granting a new trial must be reversed. Fitger v. Guthrie, 89 Minn. 330, 94 N. W. 888; Smith v. Minneapolis St. Ry. Co., 91 Minn. 239, 97 N. W. 881; Owens v. Savage, 93 Minn. 468, 101 N. W. 790. We are unable to find any errors in the record. The court did not specifically submit for the consideration of the jury the question whether or not the contract had been ratified; but no proper request was made upon that subject.

Plaintiff was not required to repudiate the contract nor return the money after being notified of the claim of settlement by service of the answer. Chicago v. Doyle, 18 Kan. 58. From the nature of the defense pleaded it is evident that defendants intended to hold plaintiff to the contract, if possible, and that they would have refused a tender of the money; and plaintiff was not required to do an unnecessary thing. The jury having sustained plaintiff's version of the contract of settlement, the amount paid—$75—should be deducted from the verdict. The trial court might have given this direction, but, having failed so to do, the verdict should be modified accordingly.

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It is therefore ordered that the order denying defendants' motion for judgment notwithstanding the verdict be affirmed, and that its order granting a motion for a new trial be reversed, and the district court is directed to enter judgment for plaintiff against defendants for $1,925, and for his costs and disbursements.

SARAH JANE GRIFFIN v. MINNESOTA TRANSFER RAILWAY COMPANY.[1]

February 8, 1905.

Nos. 14,189—(212).

Evidence of Negligence.

Plaintiff's intestate was killed while riding two loaded gondola cars which had been kicked to a switch track from a train on the lead track for the purpose of coupling them with other loaded cars upon the switch track. The cars were driven with greater force than necessary to send them to the desired point, and the deceased was found lying upon the track underneath, and about six feet from the end of, the car he was riding. There was no evidence that the cars were delivered with unusual force, or ran at an unusual speed, and there was no evidence of injury to the cars coupled.

Held, the evidence was not sufficient to justify the inference that the switchman met his death because of any negligent acts on the part of defendant.

Action in the district court for Ramsey county by plaintiff, as administrator of the estate of William H. Griffin, deceased, to recover $5,000 for the death of decedent. The case was tried before Kelly, J., and a jury, which rendered a verdict in favor of plaintiff for $4,550. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed and judgment ordered for defendant.

W. H. Norris and *F. W. Root*, for appellant.

Oscar Hallam and *C. L. Caldwell*, for respondent.

[1] Reported in 102 N. W. 391.

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LEWIS, J.

Plaintiff's intestate was killed March 16, 1903, while switching loaded freight cars from incoming and outgoing trains in defendant's yards at the Minnesota Transfer, which contains a large number of tracks, and each yard has its own lead track, with numerous switch tracks branching off first at an angle and then running parallel. Deceased was working with a crew of men under a foreman in the "B" yard, where the tracks were on a slight grade to the north. The crew consisted of the foreman, fireman, engineer of the switching engine, and two switchmen, one of whom was Griffin, the deceased. There were thirteen tracks, numbered consecutively. At the time of the accident Griffin was assisting in switching two gondola cars that had been detached from a train of about twelve cars on the lead track and switched to track No. 13, the most northerly in that yard, it being the intention to couple them with a bunch of six loaded box cars standing on track No. 13. When last seen, Griffin was standing on the north end of the north gondola car, having hold of the brake. Half an hour later he was missed, and when found the gondola cars were coupled to the box cars and Griffin lay dead under the gondola car on which he had been riding, his body lying diagonally between the rails at a point about six feet from the end of the car, just past the forward trucks. His neck was broken, but there were no other marks upon his body except an abrasion on one cheek. Between the gondola car and the box cars to which it was coupled was a space two and one half feet wide. A light rain had fallen for an hour or two, and the tracks were wet, though not frozen. The gondola cars were loaded with what is known as "angle iron." Everything was found intact about the coupling and the brake. There was nothing to indicate a violent collision, and the brake was not set.

On this occasion the foreman had ordered what is known as a "double cut," the engine upon the lead track moving back with sufficient force so that the momentum of uncoupled cars, when the train was slackened, would be sufficient to carry the gondola cars upon switch track No. 13, and at the same time carry other cars upon No. 11; the other switchmen in the meantime operating the switch at track No. 11. In order to make this double cut, it was necessary to move the train a little faster than required to make a single cut. Griffin had

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worked at the transfer as a switchman or helper for about three months, and had been at work in this particular yard about thirty days. A gondola car is a flat car, with side boards a little over two feet high, with a projecting platform about eighteen inches at each end of the car, outside of the sideboards. The brake staff, as the car was moving, was on the front end of this platform on the east side of the drawbar. When the cars were first examined after the discovery of the accident, a rough stone six or seven inches in diameter at one end and tapering towards the other end was found upon the platform to the west of the brake staff. The brake was operated in the ordinary manner by setting the foot against a ratchet, and with the hands turning a wheel at the top. The cars were equipped with automatic couplings, which would not couple unless one or both of the knuckles were open, which it was the duty of the switchmen to see were open in order to effect a coupling. On box cars it was the practice to get down on the ground and open the knuckles of the standing car, but in case the switchman was riding a flat or gondola car he frequently reached down with a stick and opened the knuckle.

The trial resulted in a verdict for plaintiff, and appeal was taken from an order of the court denying defendant's motion for judgment notwithstanding the verdict, or for a new trial.

The various acts of negligence charged to defendant were that its foreman was negligent, under all the circumstances, in making the so-called "double cut"; that the foreman and engineer were negligent in kicking the gondola cars harder than was usual or necessary; that Griffin's death was caused by the unusual and severe concussion of the cars when coupling; that defendant was negligent in allowing the stone to remain on the narrow platform or ledge on which Griffin was obliged to stand and work in setting the brake. On the other hand, it was submitted on behalf of defendant that it conclusively appeared from the evidence that, whatever may have been the cause of Griffin's death, it was not occasioned by any negligence on the part of defendant.

Two theories are advanced to account for this unfortunate accident. By plaintiff: That there was evidence tending to show Griffin was a green hand, with no knowledge of the practice of making double cuts, and that upon this occasion the momentum given the gondola cars was of such force that he was unable to control them by means of the

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brake, and that they ran at an unusual rate of speed, striking the six loaded box cars with such force as to hurl him to the ground, and carry the box cars, including the gondolas, for a distance of six or seven feet, thus running over him. On the other hand, it is claimed by defendant that the following is the more reasonable theory and is supported by the evidence: That making double cuts was an everyday occurrence; that Griffin knew it was being made on this occasion; that the cars were not proceeding at an unusual and unnecessary speed; that they were entirely under his control; and that he probably lost his balance while endeavoring to open the knuckle of the coupler with the stick, and so fell under the forward end of the gondola car on which he was riding, at a point six or seven feet before it reached and coupled with the box cars.

The question was submitted to the jury by the trial court, and the court refused to disturb their verdict upon the ground that they were warranted in drawing the inference from the circumstances, that Griffin met his death by reason of the negligent acts of defendant in making the double cut and in sending the gondola cars down the lead track at an unusual and unnecessary rate of speed, which Griffin was not required to and did not anticipate, but was killed while in the exercise of his duties as a switchman, endeavoring to control the cars.

While defendant presents a theory claimed to be the most reasonable to account for the accident, its acceptance is not necessary in order to release defendant from the imputation of negligence. The switchman may have met his death in some entirely different manner, and it is only essential to determine whether it was caused by the negligent acts of defendant. The foreman, who was called as a witness on behalf of plaintiff, testified that it was customary to make double cuts whenever opportunity afforded, and that on this occasion the two gondola cars were kicked off harder than they would have been for a single cut; that he did not know exactly where the box cars were standing on No. 13, and could not see them on account of cars on track No. 12, and that, if he had known just where the cars on No. 13 were located, he would not have kicked the gondola cars as hard as he did; but he further testified that the two cars were entirely under the control of the switchman, and could have been slowed down by him to the proper speed necessary to make the coupling. He also testified that,

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track No. 13 being on a downgrade, the gondola cars would have gradually acquired greater speed after leaving the curve, unless controlled by the brake, and all that was necessary was to send them along the lead track and around the curve onto the switch track so that by their momentum they would reach the intended place, the cars being all the time under the control of the switchman, whose specific duty it was to operate the brake, regulate the speed, and stop the cars where desired.

The only evidence in the case to indicate that on this particular occasion the cars were kicked off harder than necessary is the statement of the foreman that, had he known exactly where the box cars on No. 13 were, he would not have kicked quite as hard as he did. This statement is somewhat in conflict with his previous statement to the effect that the track was slightly downgrade, and, if the cars kicked off were given sufficient momentum to pass the curve, they would of themselves acquire sufficient speed to make the intended coupling. However, there is nothing in the case to indicate that the rate of speed, although more than necessary to accomplish the particular object on this occasion, was greater than could be controlled by the switchman in charge, and, so far as appears, the speed was no more than customarily given such cars in making double cuts. In conducting such switching operations the foreman could not be required to judge with precise accuracy the location of the cars he desired to couple with, and the exact momentum needed. True, unusual and unexpected impetus given cars upon such occasions might take switchmen and brakemen unaware, and render the company liable, but there is no evidence to that effect in this case. When last seen, Griffin was at his post. There was nothing unusual in the speed of the cars or his actions to attract the attention of those whom he passed, and, although the rails were wet, there was nothing to indicate that he was prevented from performing his duty in controlling the cars and regulating the speed to that required for the coupling, except the fact that he was found under the forward trucks of the car he was riding, and that, as already stated, the cars were sent off with more speed than necessary to reach the box cars.

The evidence does not disclose whether Griffin had been employed in making double cuts, but it is conclusive that the making of double cuts was of daily occurrence in that yard during his employment there.

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There is no evidence to suggest that he was unacquainted with the duties he was performing, and did not fully understand how to apply brakes and make couplings, except the mere statement of the foreman that he appeared green and awkward. There is no evidence that the six loaded box cars on No. 13 were moved by impact, except the inference drawn from the position of Griffin's body. It must be assumed, under the evidence, that the switchman was in the performance of his duty, and reduced the speed of the car he was riding sufficiently to avoid such a violent concussion as to cause the accident in the manner claimed by plaintiff.

The stone found upon the ledge of the car was not shown to have any connection with the accident, and to our minds the conclusion reached by the jury is based upon pure conjecture, having no foundation in the evidence. It will probably never be known exactly how this man met his death, but, in order to charge defendant with negligence in contributing to it, something more tangible was required than the mere fact that his body was found in the position stated, and that the cars were kicked off at a greater speed than necessary on that particular occasion.

It is evident that all available light has been thrown upon the incident, and that a new trial would be of no avail. It is therefore ordered that the order appealed from be reversed, and that judgment be entered in favor of defendant.

BOARD OF COUNTY COMMISSIONERS OF RAMSEY COUNTY v. FRANK E. ELMUND and Others.[a]

February 10, 1905.

Nos. 13,971—(9).

County Treasurer—Payment of Forged Orders.

Where the county treasurer recognizes an order on the treasury issued from the county auditor's office on the proper blank, which is in all things regular on its face, and issues a check upon the legal county depositary for the sum named therein, payable to the person who is designated as payee, and apparently entitled to receive the same, then delivers such

[a] Reported in 102 N. W. 719.

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check to the pretended representative of such payee in good faith and without negligence, neither he nor his sureties are liable on his official bond for a forgery of the order or of the indorsement of the payee named thereon.

Action in the district court for Ramsey county to recover from defendants Frank E. Elmund, former treasurer of said county, and his sureties, $6,052.56 upon his official bond. The case was tried before Jaggard, J., who found in favor of plaintiff for the sum demanded. From an order granting a motion for a new trial unless plaintiff should consent that the amount of the recovery be reduced to $2,108.97 with interest, plaintiff appealed. Affirmed.

Thos. R. Kane, County Attorney, and *O. H. O'Neill,* Assistant County Attorney, for appellant.

Edward P. Sanborn, for respondents.

LOVELY, J.[2]

This is an action against Frank E. Elmund, treasurer of Ramsey county, and the sureties on his official bond, for payments in cash and by check on fictitious redemption and refunding warrants issued from the office of the county auditor.

The action was tried to the court, who made findings of fact to the effect that the allegations of the complaint were true; that W. B. Bourne, as deputy county auditor, made out a number of orders apparently in conformity to law, in each of which the name of the payee was stated, and were required to be paid and redeemed; that the persons named as payees were not entitled to receive the amounts designated therein for the reason that none of them had any claim whatever against the county; that Bourne forged on each of these orders the name of the payee, and then presented the same for allowance to the defendant Elmund, as treasurer, who paid the same when presented; that the refundment orders were signed by the chairman of the county board, recognized by the treasurer as genuine, who in some cases paid the amount called for in cash to Bourne, and in others, specifically designated in the findings, by checks on the county depositaries in favor of the persons who, according to the warrants, were entitled to receive the same, which he delivered to Bourne. Upon the facts thus found the court held as

[2] This case was argued and submitted before December 31, 1904.

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a conclusion of law that as to the warrants paid in cash as well as by checks the defendants were liable.

Afterwards upon defendants' motion for amended findings, the court further found that the refunding and redemption orders were filled out by Bourne in the legal and customary form on blanks furnished and kept in the office of the county auditor for use, and were regular on their face; also that the defendant Elmund had no actual knowledge that the refunding and redemption orders, or any of them, were invalid, or that the indorsements upon any of them were forgeries, at the time payments were made and checks given. The conclusion of law holding the defendants liable was allowed to stand.

There was a motion for a new trial upon a settled case containing the entire evidence upon the ground that the findings and decision of the court were contrary to law and for errors of law. In disposing of the motion for a new trial the court ordered that it should be granted unless the plaintiff's attorneys should serve upon the defendants' counsel within a specified time the consent of the plaintiff that the amount for which judgment was directed in the findings be reduced to the extent of the aggregate sums designated in the checks given on the county depositaries, being upwards of $3,500. The legal representatives of the county declined to abide by the reduction, and appealed to this court from the order for a new trial.

Upon the record presented here, as counsel seemingly agree, the direct question to be determined is whether the delivery by the treasurer to Bourne of checks for the amounts of the refundment and redemption orders as disclosed therein protects him and his sureties from liability to that extent. While the trial court did not distinctly find that there was no negligence on the part of the treasurer in the delivery to Bourne of these checks payable to the persons named in the simulated orders, and went no further than to say that the treasurer did not have "actual knowledge" that the orders were irregular, or that the indorsements were forged, yet an examination of the entire record fails to disclose that the treasurer had any information sufficient to put him upon inquiry of their spurious condition. Upon this state of the record we are required to hold that the order reducing the amount for which the treasurer is to be held involves necessarily the conclusion that there was no negligence upon his part in issuing the checks. Or, in other words, that

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the delivery to Bourne, who was then acting as deputy auditor, of the checks made payable to the designated payees in each on the proper county depositary relieved him and his sureties from liability for such amounts; and, so far as this appeal is concerned, we are authorized to go no further than to determine whether the delivery of the checks in the manner stated by the treasurer in good faith, and without negligence on his part, was a legal compliance with his duty.

It will be seen by reference to the complaint in this case that the charge was that the treasurer was negligent in paying the orders. We sustained this complaint in the case of Board of Commrs. of Ramsey County v. Elmund, 89 Minn. 56, 93 N. W. 1054, and held that, if the payees named in the orders had themselves presented them to the treasurer, he would be justified in paying them, for he would be required to go no further than to identify the person presenting the order as the person named therein; that in this respect the treasurer was in a similar position to the banker, who is required by law to assume the responsibility of knowing whether the indorsements presented on commercial paper are forged and whether the person presenting it is entitled to receive the money, following Board Commrs. of Ramsey County v. Nelson, 51 Minn. 79, 52 N. W. 991, where it was held that, if the treasurer was negligent in failing to ascertain whether the purported signatures of the payees of certain fraudulent certificates were genuine, and such negligence being the immediate and proximate cause of the loss to the county, the treasurer and his sureties would be liable.

The decision in Board of Commrs. of Ramsey County v. Elmund, supra, went no further than to determine that, where the treasurer was negligent, he would be liable; but the question here requires us to determine, under the precise facts found and disclosed by the record, whether, when the treasurer, acting in good faith, and without negligence, delivers a check on a county depositary which was fabricated by the officer authorized to draw the same in a proper case, to the payee named in the check or his agent, which would have to be collected at the bank by presenting the same by such person or his indorsee, this must be an act of negligence per se because of the spurious character of the simulated order. Although the orders were fabricated, they were regular on their face, and the treasurer had no reason to doubt their genuineness. There were forged indorsements thereon, but the treasurer did not go so

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far as to determine or act upon such indorsements, but made and delivered checks payable to the persons to whom the warrants directed payment, and we are not able to hold that the treasurer in such a case would be liable. To demand this would be to impose upon him judicial duties based upon the mere surmise that the trusted servant of another department of the county had committed a crime, and in presenting the orders was attempting to reap benefits therefrom by an unlawful raid upon the public funds.

Some benefit must be given to the presumption that public officials will and have done their duty. If this could not be relied upon by the disbursing official, it would be his duty to question the genuineness of every warrant presented to him for payment where there was nothing on its face or in the conduct of the person presenting it to excite suspicion. We must, in determining this question, take into account the manner in which the business of this country is conducted. Many of the persons to whom the redemption and refundment warrants are usually payable do not reside at the treasurer's home or in this state. It is the usual custom by such persons through correspondence to secure the amounts due them from the treasurer through representatives and agents. Such owners cannot be expected and seldom do present these warrants in person, but often delegate either the officers of the county or actual residents to act for them. The disbursing officer, who may well be supposed to assume that an order is genuine, and that the persons presenting it have the right to its possession, and delivers to the person presenting it a check payable to the one apparently entitled to receive the money, would seem to act in conformity to law. The responsibility for the wrong in such a case must rest in the first instance upon that department of the county which fabricated and issued the orders, and this is aside from the duty of the person or bank paying the money to determine whether it is forged. The banks upon whom the checks were drawn were not the treasurer's agents. He had no voice in selecting or naming them as county depositaries. This was done by the county itself through its board of auditors. G. S. 1894, §§ 728, 733. When the treasurer had deposited the funds of the county in the bank so designated, and in the name of the county, the treasurer is exempt from all liability by reason of the loss from failure, bankruptcy, or any other acts of any such bank or banker. G. S. 1894, §§ 729, 730; State v. Bobleter, 83 Minn. 479, 86 N. W. 461.

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We are satisfied upon the record presented before us that there was no liability on the part of either the treasurer or his sureties where the checks to the payees of the simulated orders apparently good on their face were delivered to a person who presented the same, where the treasurer acted in good faith, and was not negligent; and this leads necessarily to the conclusion that the appeal of the county from the conditional order directing a new trial must be affirmed.

Order affirmed.

BOARD OF COUNTY COMMISSIONERS OF RAMSEY COUNTY v. DENNIS M. SULLIVAN AND OTHERS.[1]

February 10, 1905.

Nos. 13,969—(8).

Deputy County Auditor—Forged Orders.

A large number of refundment and redemption orders were fabricated by one who assumed to act as deputy county auditor of Ramsey county, and was permitted to do so as described in State v. Bourne, 86 Minn. 426, 432. The indorsements of the payees on these orders were forged thereon by such person, and then presented to the county treasurer, who paid to him, as the representative of the payees, either the cash or gave checks on county depositaries for the respective amounts specified therein. *Held*, in an action against the auditor and sureties on his official bond:

1. That the acting official, who had received an appointment as deputy auditor during the previous term to that which the bond applied, and continued to hold over, was a de facto officer.

2. That whether he was such de facto deputy auditor or not, the principal and his sureties were liable on the bond under the established facts, which show that the county auditor permitted the person assuming to act to retain possession of the office and act in that capacity.

3. That the negligence of the treasurer in paying cash or giving checks would not relieve the auditor and his sureties for the concurrent negligence of the principal in the bond.

Action in the district court for Ramsey county to recover from defendant Dennis M. Sullivan, former auditor of that county, and his sureties, $5,869.22 upon his official bond. The case was tried before

[1] Reported in 102 N. W. 723.

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Jaggard, J., who found in favor of plaintiff for the sum demanded. From an order denying a motion for a new trial, defendants appealed. Affirmed.

D. W. Lawler, Robert E. Olds, and *Davis, Kellogg & Severance,* for appellants.

There is no evidence in the case that Walter B. Bourne was the duly appointed deputy county auditor of the county of Ramsey for whose acts the defendants, Sullivan and his sureties, were responsible, nor does the evidence disclose that he was a de facto deputy county auditor. The law is well settled that an appointment of a deputy officer continues only during the term for which his principal was chosen, and if his principal is re-elected or reappointed and begins a new term, the deputy must be reappointed likewise. Throop, Pub. Off., §§ 304, 582, 632, and cases cited; Smith v. Cansler, 83 Ky. 367; Greenwood v. State, 17 Ark. 332.

Assuming for the sake of the argument that Bourne was properly to be regarded as a deputy county auditor during the period in question, nevertheless such acts of his in the premises as would in that case be chargeable to Sullivan or the other defendants were not the proximate cause of the loss to the county. Board of Co. Commrs. of Ramsey County v. Elmund, 89 Minn. 56; Davies v. Mann, 10 Mees. & W., 545; Weisel v. Eastern Ry. Co. of Minn., 79 Minn. 245; Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U. S. 469, 475; O'Herron v. Gray, 168 Mass. 573; State v. Ruth, 9 S. Dak. 84

Thos. R. Kane, County Attorney, and *O. H. O'Neill,* Assistant County Attorney, for respondent.

LOVELY, J.[a]

This action was brought to recover on the bond of the auditor of Ramsey county and his sureties for the criminal misfeasance of W. B. Bourne, who was convicted, and is now serving a term in the penitentiary for the fabrication of refundment and redemption warrants upon which he illegally obtained money and checks from the county treasurer. The cause was tried to the court, who made findings of fact holding defendants liable for the aggregate sum thereby obtained. Judgment was

[a] This case was argued and submitted before December 31, 1904.

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directed therefor. A motion for new trial was denied. From this order defendants appeal.

The facts are not in dispute. Defendant Sullivan was the legal incumbent of the office of auditor from January 1, 1895, for two terms, or until January 1, 1899. The bond upon which this action was brought was given to protect the county during the second term, which commenced January 1, 1897, and was conditioned for the faithful discharge of the duties of the auditor. It was signed by Sullivan as principal, by the other defendants as sureties, and was in the form prescribed by law (G. S. 1894, § 708). During the first term of the auditor's incumbency Bourne was, on March 20, 1896, appointed deputy. The appointment was made in writing under section 715, G. S. 1894, when Bourne entered upon the duties of his office, and continued thereafter to perform duties required of the auditor in issuing warrants for the redemption of taxes under section 1610, et seq. and section 1697, G. S. 1894, as well as for redemption of lands by the owners under section 1605, G. S. 1894. He was also authorized and permitted to continue during Sullivan's second term to perform the same duties. During the last term, to which the obligations of the bond are sought to be applied, he issued a large number of such orders on the blanks furnished by the auditor and used in proper cases for that purpose, to which he attached the auditor's seal, but without the knowledge or suspicion of the auditor conceived and carried out a criminal scheme for defrauding the public treasury in the manufacture of many such orders, which he deliberately forged and issued when no money was due on any account to the persons he designated as payees. The facts with reference to these transactions are more fully set forth in the two criminal prosecutions against Bourne reviewed in this court (State v. Bourne, 86 Minn. 426, 432, 90 N. W. 1105, 1108), and need not be more particularly described. Suffice it to say that the manufactured warrants which Bourne had forged with forged indorsements thereon of the payees named were taken by him to the county treasurer, who either paid him, as the representative of the purported payees, the cash apparently due, or gave him checks for the amounts indicated on banks which were county depositaries, thus recognizing the forged orders and indorsements as genuine. The auditor was innocently deceived, likewise the treasurer, as well as the banks which paid the checks issued by the treasurer upon forged indorsements made by Bourne, the guilty party

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receiving the avails of his dishonesty, for which it is now sought to hold the auditor and his sureties upon the obligations of the official bond for the benefit of the county.

Under the statute county auditors are authorized to appoint deputy auditors by a certificate in writing. Such deputies shall, before entering upon the duties of their office, take and subscribe the oath required by law, which shall be indorsed on the certificate of appointment, and filed in the office of the register of deeds. Such deputies are authorized to sign all papers and do all things which county auditors themselves may do. G. S. 1894, § 715. No such appointment was made by the auditor subsequent to that in 1896, before referred to, and it is seriously insisted that the failure of the auditor to comply with the law in this respect did not necessarily constitute Bourne a de facto officer, nor subject his principal or the sureties on his bond for the last term to liability for his fraudulent and illegal acts during that time. We can hardly regard it as a question admitting of dispute that Bourne's appointment during the first term of Sullivan's incumbency was under a proper appointment, and his continuance during the auditor's second term without a new appointment gave him what may be termed color of office, and Bourne would be regarded as an officer de facto, and, as to the public, authorized to perform the duties which made his acts colorable and injurious; hence neither the auditor nor his sureties are relieved from the consequences of such wrongful acts. County Commrs. of Ramsey County v. Brisbin, 17 Minn. 429 (451). But we do not regard it as of much importance in determining the liability of the auditor and his sureties whether Bourne, in the issuance of the fabricated warrants, was an officer de facto or not. The undisputed evidence clearly established that the duty of issuing legal warrants was committed to Bourne and performed under the sanction of the auditor, and the failure of this official to reappoint Bourne or to file the certificate of such appointment with the register cannot be made available to him or his sureties as a defense.

If the power to appoint was committed to the auditor—as it undoubtedly was—the county should not be made to suffer for his negligence in this respect. It was clearly within the purview of the conditions of the bond that the auditor should do all things necessary to be done in the faithful discharge of his official obligations; and if the auditor permitted a volunteer or unauthorized person to perform the duties which were

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officially committed to him or his legally appointed deputy, a fortiori would he be liable, unless it could be said, after the execution of the bond, that he could surrender his authority, turn his back upon the performance of his trust, and knowingly allow others to do that for the protection of the public which was strictly and legally within the scope of his official supervision and control. Hence under any view this was a violation of the conditions of the bond.

It is further urged that the county treasurer was not authorized to issue and deliver to Bourne, on the fabricated warrants presented by him, either money or checks to discharge the apparent and simulated county orders, and hence in doing so the county treasurer was primarily and solely responsible. The reasoning by which this result is asserted rests upon the claim that the treasurer was bound to refuse to pay the money apparently due from the county on the manufactured warrants. He was required, it is insisted, to refuse to pay them either in cash or by check, because they were forgeries, although apparently genuine, and were calculated to mislead, and undoubtedly did so. It is said that we have decided that when these warrants were paid by the treasurer that this official was directly responsible for his negligence. Board of Co. Commrs. of Ramsey County v. Elmund, 89 Minn. 56, 93 N. W. 1054, following Board of Co. Commrs. of Ramsey County v. Nelson, 51 Minn. 79, 52 N. W. 991, where it was held that, if the treasurer was negligent in failing to ascertain whether the signatures of the payee to these forged certificates were genuine, such negligence was the immediate and proximate cause of the loss to the county, and hence he was responsible for resulting losses.

Much stress is laid upon the use of the term "proximate cause" in these decisions. In the last case the court had before it upon demurrer to the complaint the asserted, though disputed, liability of the treasurer, and it was held that for his negligence to ascertain the genuine character of indorsements in making payments he and his sureties might be liable to the same extent as a banker in the payment of checks, etc. The action against the county treasurer was argued at the same time as this appeal, and we only refer to that case to illustrate what we regard as the fallacy of defendants' position. If we should concede that the recognition by the treasurer of every one of these warrants would have rendered him liable upon the ground laid down in the case of Board of Co.

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Commrs. of Ramsey County v. Elmund, supra, it does not follow that he alone would be liable. If, as we have held in the treasurer's case, the treasurer would be responsible for his own negligence, assuming that such negligence was what would properly be termed the proximate cause of the loss to the county, it does not follow upon any principle applicable to the law which fixes the responsibility for acts of negligence that the concurrent wrongs of others which directly contribute to injury and loss would not also involve the latter in the same measure of responsibility.

The term "proximate cause," when applied to the relation between master and servant, has been often defined in abstract terms which are fruitful of many subtle refinements; but a very clear test of the liability for negligence in such cases is that it exists when the person against whom the negligent conduct is charged ought to appreciate, in the exercise of reasonable judgment, that the injury complained of would follow from his acts or omissions. Hence, if we attempt to apply this term, it would seem as if there could be little doubt but that, where the forgeries of county officers required to make out orders on the treasurer for payment by that officer and expected to be honored, as they were in this case, the wrongful acts might be rightfully termed a proximate cause of the losses to the county which followed, for there can be no doubt that Bourne's fabrications were in fact the primary wrongs which led to the depletion of the county funds; and while it was said upon the complaint in the Elmund case, which charges negligence on the treasurer, that such negligence would, if found to be true, be a proximate cause of loss, this statement is not to be construed to relieve another, whose acts, as in this instance, directly led to the result which was anticipated and procured by the latter.

Order appealed from is affirmed.

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STATE ex rel. FRANK URBACH v. PHILIP C. JUSTUS.[1]

February 10, 1905.

Nos. 14,039—(145).

Steam Engineers—Licenses.

Ordinary steam-heating plants used for heating buildings occupied in part for business and in part for residence purposes do not come within the scope or operation of chapter 91, p. 92, Laws 1899, providing for the licensing of persons operating steam boilers and steam machinery of any kind.

Appeal by defendant from an order of the district court for Ramsey county, Olin B. Lewis, J., discharging relator from the custody of defendant as sheriff of said county. Affirmed.

Frederick N. Dickson, for appellant.

John F. Fitzpatrick, for respondent.

BROWN, J.

Relator was convicted in the municipal court of St. Paul, under chapter 91, p. 92, Laws 1899, of having wrongfully and unlawfully operated a steam boiler without first obtaining a license from the state boiler inspector authorizing him to do so. He sued out a writ of habeas corpus before the district court of Ramsey county, where he was discharged, and from the order discharging him defendant appealed.

The only question presented for consideration is whether, under the conceded facts, relator violated the provisions of the statute referred to. He was engaged as fireman and had charge of a steam-heating plant located in a building in the city of St. Paul known as the "O'Brien Block." The building is a three-story structure with a basement; the ground floor of which is occupied by stores, the second and third floors being divided into flats, and occupied for residence purposes. The building is heated by an ordinary steam-heating plant, by means of which steam is generated in a boiler in the basement and forced through pipes to radiators in various parts of the building. Relator was in charge of this plant as fireman, and the contention of the state is that

[1] Reported in 102 N. W. 452.

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it was necessary, under the terms and provisions of the statute referred to, that he procure a license as an engineer. We do not concur in this contention.

The statute, construed as a whole, and particularly in connection with its title, shows beyond question that the legislature did not intend to include within its scope and operation an ordinary steam-heating plant of the character of that involved in this case. The act was designed for the better protection of life and property by providing for the inspection of steam vessels and steam boilers used to generate power for the operation of machinery, and requiring that all persons having charge of the operation of the same, and masters and pilots of steamboats on inland waters of the state, be competent and qualified for the service. Section 10, c. 253, p. 410, Laws 1889, provides that no person shall be intrusted with the operation of any "steam boiler or steam machinery" who has not been examined by an inspector, and found competent and fit to perform the duties of an engineer, and who has not received from such inspector a written license to so act. It further provides that any person who shall operate a steam boiler or steam machinery of any kind without first obtaining a license shall be guilty of a misdemeanor. This language is somewhat broad, prohibiting, as it does, any person not duly licensed from operating any steam boiler or "steam machinery of any kind." Still, when taken in connection with the whole act, we are satisfied it was not intended to cover a case like that at bar.

By chapter 131, p. 186, Laws 1903, steam-heating plants in private residences were expressly excepted from the operation of the act, in so far, at least, as inspection is concerned; and, if the legislature did not deem it proper or necessary that plants of that character be inspected, it follows, as a necessary corollary, that the lawmakers did not intend to require that such plant should be operated by licensed engineers. For, if there was no necessity of inspection to determine whether the plants were in good order and condition, it would be unnecessary that they be operated by licensed engineers. The plant operated by relator comes within the exception just referred to.

Order affirmed.

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MOSES FERGUSON v. BETSEY TROVATEN and Another.[1]

February 10, 1905.

Nos. 14,043—(45).

Vendor and Purchaser—Statute of Frauds—Printed Signature.

Action to recover the possession of land. Each party based his right of possession upon a contract of sale and purchase from the same party. *Held:*

1. To constitute a contract for the sale of real estate valid within the statute of frauds, a written offer to buy or sell it must be accepted in writing, but the offer and acceptance need not be in the same writing.

2. The printed signature of the authorized agent of the vendor appearing in the writing in this case, which is claimed by the defendants to be a valid contract for the sale of the land, does not constitute a subscribing or a signing of the contract within the meaning of the statute of frauds.

3. It was error for the trial court to exclude an offer on behalf of the defendants to show an oral acceptance of their application to purchase the land, with proof of such performance on their part as would take the contract out of the statute.

Action in the district court for Wilkin county to recover possession of land and $1,000 for the detention thereof. The case was tried before Flaherty, J., and a jury, which rendered a verdict in favor of plaintiff for possession and $540 damages. From a judgment entered pursuant to the verdict, defendants appealed. Reversed and new trial granted.

Lyman B. Everdell and *Chas. E. Wolfe,* for appellants.

W. V. Kane and *Thomas Kneeland,* for respondent.

START, C. J.

This is an action to recover from the defendants the possession of the land described in the complaint, with damages for withholding it from the plaintiff. Both parties claim title through a common source, the Northern Pacific Railroad Company, hereafter referred to as the company. The plaintiff's claim to the land was based upon an execu-

[1] Reported in 102 N. W. 873.

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tory agreement to convey the land to him for the sum of $3,000, made July 2, 1901, by the company, and a further contract made by it on December 23, 1902. In this last contract it was recited that it was the intention of the parties by the original to confer upon the plaintiff the right of possession to the land, and such right was thereby expressly given and confirmed to him, subject to any right in the land existing in any other person theretofore acquired from the company. The defendants' claim to the land and their right to retain the possession thereof was based upon an alleged contract with the company for the purchase of the land by the defendant Betsy Trovaten, the wife of her codefendant, the payment of the purchase price therefor, and the entry into the possession thereof under the contract, and the making of permanent improvements thereon.

At the close of the evidence the trial court directed a verdict for the plaintiff for the recovery of the possession of the land, and submitted only the question of damages to the jury. The jury returned a verdict accordingly, and awarded the plaintiff damages in the sum of $540. The defendants then made a motion for judgment in their favor notwithstanding the verdict, or for a new trial. The motion was denied, and judgment entered on the verdict, from which the defendants appealed.

The assignments of error relied upon by the defendants are to the effect that the trial court erred in its rulings as to the admission of evidence and in directing a verdict for the plaintiff. This necessitates an examination of the evidence received on the trial and that offered by the defendants and excluded by the court. The plaintiff offered in evidence his contracts with the company, to which reference has been made. The contracts established a prima facie right in the plaintiff to the possession of the land. The evidence, however, was undisputed that the defendants have been in the actual possession of the land and cultivating it since April, 1900; hence the plaintiff, who did not obtain either of his contracts until July, 1901, is charged with notice of the rights of the defendants in the land, if any they have.

It is practically admitted that at all times hereinafter stated Wilsey, the land agent of the company, and Phipps, its land commissioner, were each authorized to sell its land in this state and execute contracts therefor, but all applications for the purchase thereof were

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subject to the acceptance and approval of the land commissioner. The defendants offered evidence tending to show: That A. A. Trovaten, hereafter referred to as the "defendant," went, on July 22, 1899, to the office of the land commissioner, and made application to him to purchase the land in question for his wife. That at this time the company had not then perfected its title to the land, as it was indemnity land, and the defendant then had a contest as to it pending in the proper land office of the United States. That the defendant then had a talk with the land commissioner as to the terms upon which an application for the purchase of the land would be accepted, and the terms of the sale were talked over. That the land commissioner dictated to one of his clerks the terms of the application, which was partly printed and partly written, and when completed it described the land, stated the purchase price therefor ($1,200), the time and manner of the payment, and the names of the parties, and in the margin thereof these words:

> A. A. Trovaten, contestant, is to relinquish contest, and if we perfect title, sale is to be entered and deed made; otherwise relinquishment and money to be returned.

That the defendant then signed the application, but there was no written acceptance by the company at this time other than the writing in the margin thereof and the printed signatures of its land agent and land commissioner at the end of certain printed instructions and conditions. Then followed, in the same instrument, the application proper for the sale of the land. That seven days thereafter the defendant paid to the company $400 on the purchase price of the land, and on December 29, 1899, he paid the balance thereof, $800. That the company acknowledged in writing, signed by its land agent, the receipt of these payments. That the receipt for the first payment was in these words:

> Your favor of the 26th instant remitting $400 on account of application for the S. E. ¼ of section 1, in township 134, of range 48, is received. I note your statement that the balance of amount can be forwarded when we are prepared to enter sale. It was the understanding at the time this matter was talked over in the office that you would remit the full amount required, and that same would be held with your application until the company can perfect title and transfer the property to you by

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deed. Kindly forward balance of the amount together with your formal relinquishment as soon as possible and oblige.

That the defendant relinquished his contest, and paid the balance of the purchase price as requested; and that on February 23, 1900, the company wrote the defendant that it was holding his application until such time as the question of title could be adjudged.

On the trial the defendants also offered to show by the defendant substantially these facts: That the land commissioner orally offered to sell the land for $1,200; that the defendant accepted the offer; that his application for the purchase of the land was then prepared, and signed by him, as before stated; that the land commissioner accepted and approved of the application, and agreed that as soon as a patent for the land was secured a deed therefor would be made to the defendant's wife; and that the defendants paid the purchase price, entered upon the land, and made valuable improvements thereon. The court excluded the evidence upon the objection of the plaintiff, which was to the effect that statements and negotiations prior to the written application were inadmissible to contradict or vary the writing.

The defendant had testified that the land commissioner said nothing about accepting the application after it was made. The company, on April 29, 1901, offered to return to the defendant the purchase price of the land, but he refused to receive it. It does not appear from the record when the company secured a patent for the land, but it is admitted by the pleadings that it secured the legal title thereto long before the plaintiff obtained his original contract for the purchase of the land. The application and receipts were received in evidence over the objection of the plaintiff to the effect that they were incompetent and immaterial for the reason they did not tend to show any valid contract for the sale of the land, there being no written acceptance of the contract by the company.

1. The defendants' first group of assignments of error relate to the question of damages for the withholding the possession of the land from the plaintiff. Evidence on behalf of the plaintiff was received over the objection of the defendants, tending to show the rental value of the land from the date of the plaintiff's original contract, and it is apparent from the record that the jury included in the verdict the rental value from that date. The defendants claim that this was error, be-

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cause the original contract did not give the plaintiff the right of possession of the land as against the company or any one else. The contract contained no express agreement as to the possession of the land, but it provided for the payment by the plaintiff of the taxes assessed thereon, and the payment of the interest annually on the purchase price from the date of the contract; and, further, that the buildings and improvements then and thereafter placed on the land should not be removed therefrom. The contract contained other provisions indicating that it was the intention of the parties to thereby give the plaintiff the right of possession. We hold that the contract gave the plaintiff, as against the company, the right of possession of the land from the date of his contract. Olson v. Minnesota & N. Wis. R. Co., 89 Minn. 280, 94 N. W. 871.

2. The remaining assignments of error relate to the action of the court in excluding the evidence offered by the defendants and in instructing the jury to return a verdict for the plaintiff. The answer alleges a contract for the purchase of the land from the company to the defendants; that they paid the purchase price thereof, and on April 15, 1900, entered into possession of the land under such purchase and payment, and made improvements thereon of the value of $1,500. No objections to the answer were made before or during the trial of the action. The answer must, then, be liberally construed, and it may be fairly held to allege a contract for the purchase of the land, followed by payment of the purchase price, entry into possession of the land under and in reliance upon the contract, and the making of valuable improvements thereon to the amount of $1,500. It may be inferred that the improvements were permanent from their value, for it would be difficult to improve a farm to the extent of $1,500 unless the improvements were of a permanent character.

Now, if the defendants had proved on the trial these allegations of their answer, either by documentary or oral evidence, or both, it would have defeated the plaintiff's right of possession to the land. This conclusion follows from the rule that a verbal contract for the sale of land may be enforced where there has been a part performance thereof on the part of the vendee by payment of the purchase price, entrance into possession of the land under and in reliance upon the contract, and making valuable improvements thereon. Jorgenson v. Jorgen-

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son, 81 Minn. 428, 84 N. W. 221. It is the contention of the defendants (a) that they gave in evidence a memorandum in writing of the terms and conditions of a contract for the sale and purchase of the land executed by the parties in a manner sufficient to satisfy the statute of frauds; (b) that, if this be not so, then the documentary and oral evidence received on the trial in connection with the evidence offered and excluded by the court were sufficient to show a verbal contract for the purchase of the land, and such performance thereof by the defendants as to take such contract out of the statute of frauds.

3. Counsel for defendants urge in support of their first proposition that the documentary evidence, considered as a whole, shows a valid contract of sale and purchase of the land without reference to the evidence as to the performance of the contract by the defendants. To constitute a contract for the sale of real estate valid within the statute of frauds, a written offer to buy or sell it must be accepted in writing. Lanz v. McLaughlin, 14 Minn. 55 (72). The offer and acceptance in such a case need not be contained in one writing, but detached writings, or a series of letters, if so connected by reference therein to show that they all relate to the same transaction, may constitute a valid contract for the sale of real estate. Sanborn v. Nockin, 20 Minn. 163 (178); Tice v. Freeman, 30 Minn. 389, 15 N. W. 674. It is claimed on behalf of the defendants that the printed signature of the land commissioner in the application was a sufficient signing to constitute an acceptance within the rule stated. It is obvious from a mere inspection of the application that the name of the land commissioner printed thereon was intended only for the purpose of authenticating the printed instructions and conditions, and, further, that it is not a signature within the meaning of the statute. Browne, St. Frauds, § 357.

Again, it is urged that the letters herein referred to establish a written acceptance of the application; but they were signed by the land agent, and not by the land commissioner, to whose approval all applications were subject. It follows, and we so hold, that the documentary evidence offered by the defendants did not establish a valid contract for the sale and purchase of the land.

4. This brings us to the question whether the trial court erred in excluding the offered oral evidence and instructing the jury to return

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a verdict for the plaintiff. The principal reasons urged on behalf of the plaintiff in support of the court's ruling are to the effect that the offer to prove a verbal acceptance of the application was inconsistent with the claims under the alleged written contract for the sale of the land; and, further, that it tends to vary the terms and conditions of the application and letters already in evidence, which show that the land commissioner treated the application at all times simply as an unaccepted one. There was no inconsistency in the claims made by the defendants. The answer alleged a contract for the sale and purchase of the land, and such performance thereof by them as would take an oral agreement out of the statute of frauds, without stating whether the contract was a written or a verbal one. This authorized the proof of either a written contract for the purchase of the land sufficient to satisfy the statute of frauds, or an oral one with proof of such performance as would take it out of the statute. Slingerland v. Slingerland, 46 Minn. 100, 48 N. W. 605.

The defendants' claims in this respect were alternative, not inconsistent, ones. The fact that they offered documentary evidence, which was received over the plaintiff's objection that it was not sufficient to satisfy the statute of frauds, did not preclude them from proving an oral acceptance of their application and performance of the contract by them, for there was, as a matter of law, no written acceptance of their application. It is to be noted in this connection that the defendants did not propose to show any other or different conditions and terms of sale than those stated in the application. Nor was the offered evidence so obviously inconsistent with the testimony given by the defendant before the offer was made as to justify the ruling of the court, for his testimony to the effect that the land commissioner said nothing about accepting the application after it was made may be construed as referring to the time after the terms of the application had been dictated to the clerk by the commissioner and signed by the defendant as written out by the clerk. Nor was the offered evidence inconsistent with the documentary evidence, for the alleged reason that such evidence conclusively shows that the application was never treated by the commissioner as anything more than a standing, unaccepted one.

We have stated the substance of the documentary evidence bearing upon the question of the acceptance by the company of the application.

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We, however, refrain from discussing it, as there must be a new trial. It is sufficient to say that, taken as a whole, the documentary evidence does not conclusively show that the land commissioner treated the application only as a standing and unaccepted one. On the contrary, it may be fairly construed as not inconsistent with the claim of the defendants that the application was orally accepted, subject only to the condition that the company should be able to perfect its title to the land.

The last objection to the offer of evidence to be considered is to the effect it was not specific enough as an offer to show that possession was taken under the contract with the express or implied consent of the company. No such objection was made on the trial, and, in view of the objections actually made and the evidence then before the court, we are of the opinion that the offer was sufficiently specific. We hold that the exclusion of the evidence offered was error, for which a new trial must be granted.

Ordered that the judgment appealed from be reversed, and a new trial granted.

SELINA REED v. FREDERICK P. SIDDALL and Others.[1]

February 10, 1905.

Nos. 14,123—(125).

Registration of Title to Real Estate.

The object and purpose of chapter 237, p. 348, Laws 1901, known as the "Torrens Act," was to provide a speedy and summary method of determining rights and interests in real property, and to authorize the court, in proceedings thereunder, to hear and determine all controversies respecting the title, and by proper decree to definitely fix, establish, and declare the title, rights, and interests of all interested parties.

Mechanic's Liens.

The court has no power, in proceedings conducted under the act, to order the foreclosure of mechanics' liens. The existence and validity of such liens may be determined and decreed, but not their foreclosure.

[1] Reported in 102 N. W. 453.

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Foreclosure of Lien.

The filing of an answer by a defendant in such proceedings, setting up the existence of a mechanic's lien, is not equivalent to the commencement of an action to foreclose the lien, and does not operate to continue the same in force beyond the period limited for its foreclosure by the general statutes.

Burden of Proof.

The burden of proof is upon the party asserting a mechanic's lien in proceedings under the Torrens act to register title, to prove that at the time of the trial in such proceedings the lien was a valid and existing one.

Appeal by defendants, Aaron Carlson, Nelson-Tuthill Lumber Company, Frank T. Thompson and Warner Hardware Company, from a judgment of the district court for Hennepin county entered pursuant to the findings and order of Harrison, J. Affirmed.

A. B. Darelius, for appellant Carlson.

Smith & Wilson, for appellants Nelson-Tuthill Lumber Co. and Warner Hardware Co.

F. H. Castner, for appellant Frank T. Thompson.

A. C. Finney and *Fred W. Reed,* for respondent.

BROWN, J

In April, 1902, plaintiff made application, under the provisions of chapter 237, p. 348, Laws 1901, known as the "Torrens Act," for the registration of title to certain lots, which she claimed to own, in the city of Minneapolis. Proceedings were thereafter had as required by the various provisions of the statute, and resulted in a decree on July 26, 1902, registering title in plaintiff as prayed for in her application. Subsequently defendants applied, under section 28 of the act, for leave to interpose answers therein, and from an order granting the same an appeal was taken to this court, where it was affirmed. Reed v. Siddall, 89 Minn. 417, 95 N. W. 303.

Defendants answered, pursuant to permission granted, separately, each setting up a mechanic's lien for labor performed or material furnished in the construction of a building on one of the lots under a contract with Siddall, to whom plaintiff had, under some sort of an arrangement, agreed to sell the lot. The labor and material made the foundation of the liens claimed by the respective defendants was performed and

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furnished prior to the entry of the decree registering plaintiff's title, but the liens were not perfected by filing proper statements thereof, as required by the general statutes, until after the entry of the decree, but were perfected before the answers were served. The proceedings thereafter came on for trial before the court, and resulted in a judgment in plaintiff's favor, decreeing that she was the owner of the property in question, that the liens asserted by defendants were invalid, and that plaintiff owned the property free and clear of any incumbrance on account of such liens; from which judgment defendants appealed.

Only one question is presented for consideration in this court, and that is whether defendants had the right to a foreclosure of their asserted liens in the proceedings to register plaintiff's title.

It appears from the record that the answers were interposed prior to the expiration of the year limited by the general statutes for the commencement of an action to foreclose a mechanic's lien, but that at the time of the trial in the court below the year had long since expired. The trial court held that the liens could not be foreclosed in this proceeding, and that, as it did not appear that an action had been brought to foreclose them within a year from the date of the last item of labor or material, they had expired by limitation, and were invalid.

The mere filing of the answers, setting up the liens, and demanding their foreclosure, would not, unless the right of foreclosure exists in this proceeding, toll the statute, nor obviate the necessity of bringing an action, within the period prescribed by the general statutes, formally to foreclose them. The case is analogous, and the rule as to judgments applies. G. S. 1894, § 5425, provides that a judgment shall survive and the lien thereof continue for the period of ten years, but no longer. And it has been held that an action in the nature of a creditors' bill to enforce a judgment against property alleged to have been fraudulently transferred does not continue the same in force beyond the period fixed by that statute. Newell v. Dart, 28 Minn. 248, 9 N. W. 732. That rule governs the case at bar. Defendants' liens were valid for the period of one year from the date of furnishing the last item of labor or materterial, and no longer, unless continued in force by the commencement of an action within the year to foreclose them, and were not thus continued by the answers setting up their existence and demanding their foreclosure.

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It would be different, no doubt, if the right of foreclosure in this proceeding existed. In that case the filing of the answer would be equivalent to the commencement of an action to foreclose, and would continue the liens in force. But as the right of foreclosure does not exist in such proceeding, as we shall presently see, the filing of the answers had no such effect. If in fact actions had been brought to foreclose the liens, the burden was upon defendants to prove it. In the absence of such proof, the trial court properly held that they had expired by lapse of time. So, as already stated, the question in the case narrows down to whether mechanics' liens may be enforced in proceedings to register title under the Torrens act.

We are of opinion that the trial court correctly decided this question. A full and careful consideration of the act leaves our minds clear that the legislature did not intend to provide for the foreclosure of mortgages, nechanics' or other liens, in proceedings thereunder to register title. The object and purpose of the statute was to provide a speedy and summary method of determining rights and interests in real property, and to authorize the court in proceedings thereunder to hear and determine all controversies respecting the title, and by proper decree definitely to fix, establish, and declare the rights and interests of all interested parties. The act provides for and contemplates the determination by the court of the validity of all claims of liens or incumbrances, but not their foreclosure or enforcement.

Section 7, by which power and authority to act is conferred upon the court, provides that

> Said court shall have power to inquire into the condition of the title to and any interest in the land, and any lien or encumbrance thereon, and to make all orders, judgments and decrees as may be necessary to determine, establish and declare the title or interest, legal or equitable, as against all persons, known or unknown, and all liens and encumbrances thereon, whether existing by law, contract, judgment, mortgage, trust deed or otherwise, and to declare the priority as between the same, and to remove all clouds from the title.

Section 30 provides that every person receiving a certificate of title issued pursuant to the decree of registration shall hold the same free

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from all incumbrances, except only such estates, mortgages, liens, charges, and interests as may be noted in the certificate of title; and only such are to be noted therein as are declared to exist by the judgment and decree of the court.

Section 31 provides that every decree of registration shall bear the proper date, contain a description of the land involved, set forth the estate of the owner, and all estates, mortgages, easements, liens, attachments, or other incumbrances to which the land is subject; and, further, that immediately upon the decree being entered, a certified copy thereof shall be filed with the register of titles for the benefit of all parties dealing in the land.

Section 36 provides that every certificate of registration shall contain the name of the owner, a description of the land, the estate of the owner, and by memorandum or notation contain also a description of all incumbrances, liens, and interests to which the estate of the owner is subject.

These provisions of the act clearly indicate an intention to limit the authority of the court to an inquiry into and determination of the rights of the respective claimants to real property, to declare and fix definitely the estate or interest each has therein, and to enter a decree accordingly. The act contains no suggestion from beginning to end that mortgages or liens may be foreclosed in proceedings thereunder, either by the person seeking to register his title or by a defendant asserting a mortgage, lien, or other incumbrance. The most the court is authorized to do in any case is to determine the existence, validity, and priority of liens of conflicting claimants. That the legislature intended that the ordinary proceedings for the enforcement of such liens should remain in force and be resorted to is also clear.

Section 54 provides that nothing contained in the act shall be construed in any way to relieve land title to which has been registered thereunder from any liability to attachment, levy or execution, or from liability to liens of any description established by law, or to change or affect in any way any liability created by law and applicable to unregistered land, except as otherwise expressly provided in the act.

Section 59 provides that all charges upon registered lands, or any estate or interest in the same, may be enforced in the manner prescribed

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by law, and that all laws relating to the foreclosure of mortgages shall apply to mortgages upon registered land.

Section 68 covers the case at bar. It provides that all attachments, liens, and rights of every description shall be enforced, discharged, or dissolved by any proceeding sufficient and proper in law to enforce, discharge, or dissolve like liens on unregistered land. This section, construed in connection with the restricted authority conferred upon the court by section 7, would seem to settle the question adversely to appellants. It shows beyond doubt an intention on the part of the legislature to require all such liens to be foreclosed in the usual manner, and under the provisions of the general statutes providing for their foreclosure and enforcement. The validity of any such lien may and must be determined in the registration proceedings, but when its validity has been adjudicated and determined by the court, and the state of the title declared, it must be enforced in the manner prescribed by the general statutes. The pendency of a proceeding to register title would not be a bar to an action to foreclose the lien. While the validity of the lien might be involved in the litigation in the registration proceeding, full relief could not there be granted the lienholder, and the pendency of that proceeding would in no manner interfere with bringing an action for foreclosure.

There is no force to the suggestion that plaintiff is estopped from questioning the right of defendants to a foreclosure by her failure to interpose objections to the answers before trial.

Judgment affirmed.

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DANIEL MALONE v. JAMES T. STEPHENSON.[1]

February 10, 1905.

Nos. 14,214—(78).

Cross-Examination.

The extent to which a witness may be cross-examined as to matters not relevant to the issue, for the purpose of affecting his credibility, rests largely in the discretion of the trial court. This discretion, however, should not go so far as to sanction an attempt to discredit a witness by innuendo instead of competent evidence.

Same.

Rule applied, and *held* that the trial court erred in overruling the objections of the defendant to certain questions asked on his cross-examination.

Appeal by defendant from an order of the district court for Jackson county, Quinn, J., denying a motion for a new trial. Reversed.

W. S. Hammond, Albert R. Allen, and De Forrest Ward, for appellant.

Knox, Faber & Knox, for respondent.

START, C. J.

The complaint herein alleged that the defendant on January 28, 1898, wrongfully and unlawfully caused a dwelling house of the plaintiff, of the value of $1,600, to be set on fire, whereby it was destroyed. The answer denied the allegations of the complaint, except that it admitted that the value of the house was $800. On the trial plaintiff introduced circumstantial evidence which, as he claims, tended strongly to establish the allegations of the complaint. The defendant, in his testimony, unqualifiedly denied that he had anything whatever to do with the burning of the house, and introduced evidence tending to establish an alibi. The jury returned a verdict for the plaintiff for the sum of $320. The defendant appealed from an order denying his motion for a new trial.

The assignments of error which it is necessary to consider raise the questions: Did the trial court err in refusing to direct a verdict for the

[1] Reported in 102 N. W. 372.

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defendant on the ground that the evidence was not sufficient to sustain a verdict for the plaintiff? Did the court err in overruling the defendant's objections to certain questions put to the defendant on cross-examination?

1. We have considered the record with reference to the first question, and have reached the conclusion that the evidence was sufficient to require the case to be submitted to the jury; hence the refusal of the court to direct a verdict for the defendant was correct. We do not discuss the evidence, as there must be a new trial of the cause for other reasons.

2. The defendant was a witness on his own behalf, and upon cross-examination he was asked, among others, the following questions:

1. "You spend a good deal of your time in the saloons, do you not?"

2. "During that time you became quite intimate with Mrs. Johnson. did you not?"

3. "Is it not a fact that you accompanied her to parties and dances, and otherwise conducted yourself so that you broke up that family?"

4. "Didn't that family separate while you were there?"

5. "Don't you know they did, Mr. Stephenson?"

6. "Don't you know they did?"

7. "What became of that woman?"

8. "Didn't she and Johnson separate by reason of your conduct with reference to her?"

9. "You heard a good deal of talk about it, didn't you?"

10. "How long did you continue to live with your second wife?"

11. "Did she get a divorce from you?"

12. "Now, not long before this fire, you inflicted quite serious injuries upon that woman, didn't you, so that she required medical treatment?"

13. "Is it not true that she required the attendance of a physician to attend to injuries which she received in difficulty with you?"

14. "She did in fact go to a physician on account of injuries which she claimed you had inflicted?"

15. "You do drink a good deal?"

16. "Weren't you kept in jail in Illinois once?"

We have numbered the questions for purposes of reference only.

Questions Nos. 5, 7, 10, and 12 were severally objected to as incompetent, irrelevant, immaterial, and not proper cross-examination. The

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several objections were overruled, and the questions answered. These rulings of the trial court are assigned as error. The questions were not relevant to any issue in the case, and the only ground upon which they can be sustained is that they were within the limits of a reasonable cross-examination, for the purpose of affecting the credibility of the witness. The extent to which a witness may be cross-examined as to matters not relevant to the issue for the purpose of affecting his credibility rests largely in the discretion of the trial court. Gardner v. Kellogg, 23 Minn. 463; Alward v. Oakes, 63 Minn. 190, 65 N. W. 270. The discretion, however, should not go so far as to sanction an attempt to discredit a witness by innuendo instead of competent evidence.

Were the questions objected to within the limits of a reasonable cross-examination? We are of the opinion that they were not. The questions as to the defendant's personal habits, as to his relations with his neighbor's wife, as to his domestic relations, as to whether he beat his wife, or as to whether she got a divorce from him, were so numerous, so aggressive, so irrelevant, and so remotely affected his credibility, that manifestly the trial court erred in overruling his objections to the questions. True it is, as suggested by plaintiff's counsel, that only a part of the questions we have quoted were objected to. It is, however, necessary to consider the questions specifically objected to in connection with those preceding and following them, in order to understand them, as the jury, who heard all the questions, must have understood them.

Again, the defendant's counsel properly objected on four separate occasions to the course of the cross-examination. He was not bound to continue his objections, for further persistency, in view of the rulings of the court, could serve no other purpose except to emphasize the prejudicial effect of the questions.

Order reversed and new trial granted.

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STATE v. ROBERT H. EDWARDS and Others.[1]

February 17, 1905.

Nos. 13,997—(20).

Report to Consignor of Grain Sold.

Section 2, c. 225, p. 246, Laws 1899, requires a commission merchant, duly licensed to sell grain on commission, to render a true statement to the consignor within twenty four hours of making a sale, showing the grain sold, price received, name and address of purchaser, and the date, hour, and minute when sold, with vouchers for charges and expenses. *Held:* This law contemplates an actual purchaser, other than the consignee, and the purchase by him of such grain, after close of business hours, at the highest price of the day upon the board of trade, is not a sale within the meaning of this act, and a report of such sale to the consignor is not a compliance with its provisions. If the consignee makes such purchase and subsequently sells the same at an advance, such sale inures to the benefit of the consignor, and a failure to return to him a true statement, as provided, constitutes a violation of the law.

Purchase by Consignee.

The consignor is not estopped from repudiating a purchase of grain by his consignee, unless he acquiesces therein and ratifies the same after being fully informed of the entire transaction, including a subsequent sale at a profit.

Criminal Complaint—Intent.

The statement in the criminal complaint that defendants wilfully and unlawfully made a false report is immaterial. The penalty is imposed for a failure to render the report as provided, irrespective of intent, and it is immaterial that the consignee acted in good faith and in accordance with the custom of commission merchants in that locality.

Interstate Commerce.

Chapter 225, p. 246, Laws 1899, is constitutional, and not in conflict with the federal constitution as an interference with interstate commerce.

Appeal by defendants from an order of the municipal court of Duluth, Windom, J., denying a motion for a new trial, after a trial and conviction of the offense set forth in the opinion. Affirmed.

[1] Reported in 102 N. W. 697.

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Alexander Marshall and *Warner E. Whipple,* for appellants.

W. J. Donahower, Attorney General, and *Washburn, Bailey & Mitchell,* for the State.

LEWIS, J.

Upon the complaint of Charles F. Staples, a member of the State Railroad & Warehouse Commission, defendants, commission merchants doing business at Duluth, were charged with having violated the provisions of section 2, c. 225, p. 246, Laws 1899, in failing to render a true statement to the consignor concerning a consignment of flax. A plea of not guilty was entered, and the trial resulted in a verdict of guilty. The case is brought here upon appeal by defendants from an order denying their motion for a new trial.

It is undisputed that the consignor, Victor Carlson, resided at Hallock, Minnesota, and shipped a carload of flax to defendants at Duluth, to be sold by them on commission; that the car was shipped from Hallock, January 14, over the Great Northern Railroad, reaching Duluth January 19, 1903. Carlson made a draft upon defendants for $700, attached the bill of lading, and sent it through a bank for collection. The flax was inspected January 19 at Duluth, and was ready to be sold upon the market that day. The evening of January 19 defendants wrote consignor the following letter:

Duluth, Minn., Jany. 19th, 1903.

Mr. Victor Carlson,
Hallock, Minn.

Dear Sir:—We have received the following car of flax from you today, which inspected and sold (subject to comparison with sample) for your account and risk as stated below:

Car No.	Initial	Grade	Sold at	How sold
21048	G. N.	No. 1 Flax 14%	119½	

The market was a very narrow one all day and above was best price. Acct. sales & check to balance will follow as soon as unloaded. Trusting same is satisfactory, and awaiting your further orders, we remain,

Yours truly,

Edwards, Wood & Co.,
Geo. K. Taylor, Mngr.

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January 22 the following account was rendered:

Duluth, Minn., Jan. 22nd, 1902.

Account sales of Edwards, Wood & Co., Grain Commission Merchants, 310 Board of Trade.

Account of Victor Carlson,

Hallock, Minn.

Date Unloaded	Car	Grade	Freight	Date Sold	Gross Weight
Jan. 21	21048	Flax	83.34	1–19	980.10
		No. 1 14%			
Shrinkage by cleaning		**Net Weight Delivered**		**Price**	**Amount**
137.12		842.54		119½	$1007.33
		75			

Freight and Inspection	$83 09	
Weighing	25	
Interest		
Insurance	40	
Commission ½%	5 04	88 78
		918 55
		700 00
Balance to your credit		$218 55

January 20, defendants sold the carload of flax to the Hall Elevator Company at Duluth at $1.20 per bushel, an advance of one-half cent, but of this sale made no report to consignor. Defendants claim the sale was made to themselves at the close of the business day, January 19, and that the letter of that date, and the account stated, of date January 22, constituted a report of the transaction within the requirement of the statute. Defendants further claim that there was a subsequent ratification of the transaction by the consignor.

At the trial, the court instructed the jury that, when grain is consigned to commission merchants to be sold upon commission, it is their duty to sell it in the open market for the best obtainable price, and remit to the shipper the amount of the sale, less commission and necessary disbursements; that commission merchants have no right, when grain has been consigned to be sold on commission, to themselves purchase it, and that an attempt so to do is not binding upon the shipper; that if such an attempt is made, and thereafter the grain is sold to

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an actual purchaser, the law requires the commission merchants to make a true report of the amount received at the sale to the actual purchaser within twenty four hours thereafter; and, further, that, if the jury found from the evidence that the car in question was consigned to defendants to be sold on commission, then defendants had no right or authority to themselves purchase the grain, and any such attempt at purchase would not relieve them of the positive duty to report to Carlson the sale to a subsequent legal purchaser.

The court refused to instruct the jury, upon request of defendants, to the effect that they were not guilty if the jury should find that the duly authorized agent of defendants sold the carload of flax to them, paying therefor the highest market price of that date, and duly reported the same to the consignor within twenty four hours thereafter. The court also refused to instruct the jury that if such sale was made to defendants in accordance with the usages and customs of the Board of Trade at Duluth, at the highest price obtainable on that day, and duly reported the same to the consignor within twenty four hours thereafter, and the consignor did not within a reasonable time thereafter repudiate the transaction, then such act would constitute ratification by the consignor.

Error is also assigned in refusing defendants' offer to prove it was the custom among members of the Duluth Board of Trade to purchase for themselves consignments of grain shipped to them to be sold upon commission at the highest market price for the day, in the event that other purchasers could not be obtained. The instruction of the court to the following effect is also questioned:

> The offense charged is that of omitting to perform a positive duty enjoined upon commission merchants by the law of the state, and it is immaterial whether the defendants actually knew anything about the transaction, if the grain was shipped to them to be sold upon commission, and was sold by them, or by any authorized person acting for them, on commission.

Section 1, c. 225, p. 245, Laws 1899, defines the purpose of the act, and declares it to be unlawful to do business without procuring a license and giving a bond for the benefit of persons intrusting commission merchants with consignments; that, if such commission merchant re-

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ceive grain for sale on commission, the bond shall be conditioned that he faithfully account and report to all persons intrusting him with grain for sale, less commission and disbursements; and that, if he does not receive grain for sale on commission, the bond shall be conditioned upon the faithful performance of his duties as such commission merchant. The record shows that defendants were duly licensed to sell grain, exclusive of other agricultural products and farm produce, on commission at Minneapolis and Duluth, and that they duly executed and delivered their bond, as provided by law, conditioned to faithfully account and report to all persons intrusting them with grain to be sold on commission, less commission earned and actual disbursements.

The law does not prohibit defendants from engaging in the business of directly buying and dealing in grain, but, so far as shown, they did not take advantage of that privilege and take out a license for that purpose. Having held themselves out as commission merchants to sell grain on commission, defendants entered into an obligation to use their knowledge and position in disposing of the grain for the greatest benefit of their patrons, and were required to take all reasonable and usual means and precautions to dispose of the grain to the best advantage of the consignor immediately upon its arrival; and if for good reason they failed to dispose of it on the day of its arrival, and it was necessary to sell it at private sale after business hours of the board of trade, or to carry the grain over the day, the same duty followed them, and they were still required to exercise reasonable diligence on behalf of the shipper. They could not shift such responsibility by bidding in the property for themselves after business hours, and subsequently turn it over to some one else at a profit, and not be held accountable therefor. The record conclusively shows that on the following day the car of flax, without being unloaded, was disposed of by defendants to the Hall Elevator Company at an advance of one-half cent a bushel. Under the law of agency such sale inured to the benefit of defendants' principal, and the attempted sale to themselves, as testified to by their agent, was prima facie a nullity.

We cannot accept as applicable to this case the proposition that, if the shipper made no protest after receiving the report of the alleged sale and the proceeds thereof, he thereby accepted and ratified the sale. On the other hand, it was the duty of defendants to clearly show that

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the shipper not only knew the same was made to themselves, upon which point the report of sale is silent, but that he also knew that subsequently defendants sold the flax at an advanced price, and, being possessed of all these facts, he accepted the proceeds of the sale to defendants as final, and waived his right to profits on account of the subsequent sale. In this respect the evidence entirely fails. Conceding there is evidence tending to show that the manager, Taylor, sold the flax to defendants and made a report thereof, the evidence fails to show that the consignor ever accepted the transaction after being put in full possession of all the facts.

The complaint charged that defendants wilfully and unlawfully neglected and failed to render the statement within the time required, but, on the contrary, wilfully and unlawfully made and rendered to the consignor a false report and statement in writing, in and by which they pretended and represented they had sold the flax for the sum of $1,007.38, whereas in fact they sold it for $1,011.54. The gist of the offense is one of omission in failing to render a true statement to the consignor showing what portion of such consignment had been sold, the price received, and the name and address of the purchaser, the date, hour, and minute when such sale was made, with vouchers for all charges and expenses paid or incurred; and defendants were put on trial upon that charge, and none other. The statement in the complaint that they wilfully made a false report was unnecessary, and mere surplusage.

Upon the trial, however, in support of the offense charged, it was proper to prove what reports were made, and that such reports were not those required by law. Defendants' business was conducted through their local manager, and, it may be admitted, were acting in good faith, in accordance with the custom of commission merchants in Duluth, and the agent may in good faith have been endeavoring to comply with the law in making the stated reports, but the question of good faith or intent is not involved in this action. If, under such circumstances, a sale to themselves was unauthorized and prohibited, defendants could not avoid the effect of the statute in failing to report the sale which they did make, no matter what their intentions may have been.

In State v. Robinson, 55 Minn. 169, 56 N. W. 594, it was held that the owner of a drug store was not liable for a sale by one of his clerks,

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not a registered pharmacist, and made without his knowledge or assent. Here, however, that principle has no application. Taylor was defendants' general manager, and the only person in charge of the Duluth office, and was held out to the world as their representative to transact their business, and no claim was made at the trial that he was not authorized to do the very things which he did. On the contrary, it was insisted that his attempted purchase of the flax was justified under the law and was in accordance with the general custom.

In this connection the case of State v. O'Connor, 58 Minn. 193, 59 N. W. 999, may be considered, wherein it was held that, in order to excuse himself from liability for permitting a saloon to be kept open on Sunday, the master would have to show that it was opened against his will, and notwithstanding all reasonable efforts by him to keep it closed. The question of intent is not material in this class of statutory offenses. As remarked by Judge Cooley in People v. Roby, 52 Mich. 577, 18 N. W. 365, such statutes are in the nature of police regulations, and impose a penalty irrespective of intent to violate them, the object being to require a degree of diligence for the protection of the public which shall render violations impossible. The statute makes the act criminal without regard to intent. State v. Heck, 23 Minn. 549.

For the reasons already stated, it was immaterial that it was the custom among commission merchants at Duluth to buy grain at the highest figure for the day, in case not sold on the market. They could not make that lawful which was unlawful, and it was just such irregularities that the statute was intended to correct.

The law under consideration is assailed upon the ground that it is in violation of the federal constitution, as an interference with interstate commerce. In State v. Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134, this law was declared to be not in conflict with the fourteenth amendment of the federal constitution, nor with section 2 or 7, article 1, of the state constitution. The court at that time, after exhaustive argument, put at rest all of the questions touching upon the constitutionality of the law, except possibly an intimation that the statute did not apply to interstate business, but what was stated in the opinion on that point was by way of precaution or reservation only.

In the case before us, the consignor resided within the state, but, to our minds, that fact is not significant. The law applies to all shipments,

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from beyond as well as within the state. The object of the statute is to protect the public in its dealings with commission merchants against an infringement upon the rights of shippers of grain. Indeed, the law might be open to the objection of an unjust discrimination were its benefit conferred only upon the citizens of the state. The question of transportation is not involved. It is immaterial from whence the grain is shipped, over what route or through what states it travels to the point of destination. The provisions involved in this case take no account of the grain as an article of commerce until it has been sold, and, even then, only to require the consignee to make a true report of the transaction within a reasonable time. The subject-matter of the law as applicable to this case no more relates to interstate commerce than the criminal statutes which protect grain from larceny after arrival within the borders of the state. If it be an interference with the prerogative of Congress to require commission merchants to make a true report of their dealings with citizens of Dakota or Wisconsin for their protection, why is it not equally an interference with interstate commerce when our criminal laws are put in force to arrest and punish for the larceny of such grain upon arrival within the borders of our lines? We fancy there is no crying demand on the part of the citizens of our sister states to be excluded from the benefit of these protective measures.

This cause was submitted to the jury upon the right theory, and we find no error in the instructions or rulings.

The order appealed from is accordingly affirmed.

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A. L. STEIDL v. MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY.[1]

February 17, 1905.

Nos. 14,037—(65).

Bill of Lading.

Where the bill of lading issued by the initial carrier for goods to be transported over several connecting lines of railroad, and which may be forwarded over different lines to the place of destination, contains no directions or agreement on the subject, the right to designate the route of transportation rests, by implication of law, with the carrier, and becomes a part of the contract.

Selecting Connecting Carrier.

The right is not absolute or inalienable, however, and the contract in this respect may be changed or modified by subsequent parol agreement between the shipper and the carrier.

Evidence.

The evidence is examined, and *held* to sustain the verdict of the jury to the effect that such an agreement was made between the parties in the case at bar, and that it was founded upon a sufficient consideration, and its violation by defendant entitled plaintiff to damages.

Action in the district court for Carver county to recover $200 for breach of contract for the transportation of a carload of potatoes. The action was based upon a written bill of lading as modified by an alleged subsequent parol agreement. The case was tried before Cadwell, J., and a jury, which rendered a verdict in favor of plaintiff for $127.38. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Albert E. Clarke, for appellant.

Steidl & Houston, for respondent.

BROWN, J.

The facts in this case are as follows: Plaintiff shipped a carload of potatoes from Perham, Minnesota, over the Northern Pacific Railway, consigned to himself at Oskaloosa, Iowa. At the time of the shipment the agent of the Northern Pacific Railway Company issued and deliv-

[1] Reported in 102 N. W. 701.

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ered to him the usual bill of lading, which contained no stipulations or directions as to the route over which the car should be forwarded from Minneapolis, the terminus of the Northern Pacific line. To reach Oskaloosa it was necessary that the car be transported from Minneapolis over defendant's line as far, at least, as Albert Lea, this state. From there it might be sent over defendant's line to Angus, Iowa, thence over the Chicago, Rock Island & Pacific road to Oskaloosa; or from Albert Lea over the Burlington, Cedar Rapids & Northern road to Columbus Junction, and thence to Oskaloosa; or by way of the Iowa Central from Manly Junction to the point of destination. Prior to the time the car reached Minneapolis over the Northern Pacific line, plaintiff claims that he called on the assistant general freight agent of defendant, and entered into an agreement with him to send the car over the Minneapolis & St. Louis line to Angus, Iowa, thence over the Rock Island road to Oskaloosa.

It is claimed by plaintiff that the purpose in having the car so shipped by way of Angus was that he might at some point on the Minneapolis & St. Louis line south of Albert Lea stop the car, and make a sale of the potatoes; and that this purpose was communicated to and understood by defendant's agent at the time he agreed to send the car over that line. It is further claimed that, disregarding the agreement, defendant forwarded the car from Albert Lea over the Burlington, Cedar Rapids & Northern road, and that in consequence plaintiff was compelled to dispose of his potatoes at a price much less than he would have received for them had they been forwarded over the St. Louis line by way of Angus, and had been disposed of at points on that line. He brought this action to recover the difference between what he in fact received and what he could have sold them for on the other line. The trial court instructed the jury that, if they found that such an agreement was made, plaintiff was entitled to recover as claimed in his complaint. A verdict was returned for plaintiff, and defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict or for a new trial.

The principal question presented for consideration is whether the evidence sustains the claim of plaintiff that defendant agreed to forward the car over its line to Angus, delivering it at that point to the Chicago, Rock Island & Pacific Company. It is well settled that the owner of

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goods delivered to a common carrier for shipment may intercept them on their journey, and demand the delivery thereof to him at any reasonable point on the carrier's line short of the original destination, upon payment of the transportation charges, and surrendering, or offering to surrender, the bill of lading for cancellation. Hutchinson, Car. §§ 337, 338; Ryan v. Great Northern Ry. Co., 90 Minn. 12, 95 N. W. 758. The rule applies to all connecting carriers into whose possession the goods may come in the course of transportation. Sutherland v. Second National, 78 Ky. 250. This right plaintiff possessed in the case at bar, and if the car had been sent over defendant's line to Angus he could have intercepted it at any station, claimed his potatoes, and sold them; and if a valid agreement was made by the parties to so forward them, it was violated by defendant, and plaintiff is entitled to recover the damages sustained by him in consequence of the violation. 6 Cyc. 383. So the case narrows down to the question whether the evidence is sufficient to sustain the verdict of the jury to the effect that a valid agreement was entered into.

The bill of lading issued by the Northern Pacific Company was by its terms made the contract between plaintiff and all connecting carriers into whose possession the car might come in the course of transportation. But it contained no directions or stipulations as to the route over which it should be forwarded from Minneapolis, and by implication arising from the relations between the parties and the silence of the contract on the subject the right to forward the car over any usual and customary route rested with the defendant upon delivery to it for transportation. Snow v. Indiana, 109 Ind. 422, 9 N. E. 702. But the right was not an absolute or inalienable one. It could be waived or surrendered by an agreement subsequently entered into. 4 Am. & Eng. Enc. (2d Ed.) 545; Atwell v. Miller, 11 Md. 348. The case in this respect comes within the general rule that written contracts not falling within the statute of frauds may be changed or modified by subsequent parol agreement founded upon a sufficient consideration. 9 Cyc. 763. The trial court submitted to the jury the question whether an agreement as claimed was entered into by the parties, and they found in plaintiff's favor to the effect that the agreement was made. A discussion of the evidence upon the question would serve no useful purpose, and we refrain. It is conflicting, and it is sufficient to say that we have ex-

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amined it carefully, and reach the conclusion that it supports the verdict.

The contention of defendant's counsel that, conceding the agreement to have been made, it is void for want of consideration, and in that it varied the terms of the bill of lading, is not sound. The bill of lading, by its terms, provided, in effect, that it should constitute the contract, not only between plaintiff and the Northern Pacific Company, but also between plaintiff and all connecting carriers over whose lines the car might be forwarded in reaching its destination. The agreement relied upon by plaintiff was made subsequent to the original contract with the Northern Pacific Company before the car had been delivered to defendant, and at a time when plaintiff could have surrendered the bill of lading to the latter company and demanded a delivery of the property. The case does not come within the rule that contracts cannot be varied by parol. It was a subsequent transaction, and, if founded upon a sufficient consideration, was valid and binding between the parties, and operated to ingraft upon the original contract the terms of the parol agreement. The right of defendant to designate the route of transportation was merely incidental to forwarding the car, and no particular consideration other than the freight charges to be received for its services was necessary. It was within the authority of the agent to bind the company by the agreement.

We have considered all the assignments of error urged in the brief of appellant, and find no reason for reversing the order appealed from, and it is affirmed.

Order affirmed.

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EMERN McALLEN v. FRED A. HODGE and Another.[1]

February 17, 1905.

Nos. 14,056—(158).

Divorce.

Appellant procured a divorce from intervenor on the ground of cruelty. After the decree and divorce, the parties entered into a written contract whereby, in consideration of $7,000 cash, and the execution and delivery of a bond for $3,000, plaintiff released and discharged all claims and causes of action she had or claimed to have against any and all persons for the alienation of her husband's affections, and agreed not to bring or cause to be brought any action or proceeding against any person for the recovery of damages on that account. This action was brought against defendants Hodge for the purpose of recovering damages for the alienation of her husband's affections; and in defense thereof plaintiff's former husband intervened, setting up the written contract referred to. In answering the intervening complaint, plaintiff alleged that the contract was entered into in consideration and in pursuance of a prior agreement, made while husband and wife, to the effect that if plaintiff would withdraw a former action of divorce pending, and interpose one upon the ground of cruel treatment, the intervenor would make no defense thereto, and would pay plaintiff the sum stipulated in the contract.

Held, that the contract, while valid upon its face, according to the facts pleaded in the answer, if true, was void as against public policy. But plaintiff attacks the validity of the contract for the purpose of enabling her to violate its terms by prosecuting the action against defendants. Under such circumstances, the law will not assist her to thus take advantage of her own wrong.

Action in the district court for Pine county to recover from defendants $30,000 for alienation of the affections of Peter W. McAllen, former husband of plaintiff. Thereupon McAllen intervened setting up the contract mentioned in the opinion and praying that plaintiff be enjoined from proceeding further with the action. From separate orders, Williston, J., granting the injunction as prayed, and striking out portions of plaintiff's answer to intervenor's complaint, plaintiff appealed. Order granting injunction affirmed.

[1] Reported in 102 N. W. 707.

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Erwin & Mead and *Henry S. Mead,* for appellant.
John E. Fitzpatrick, for intervenor.

LEWIS, J.

Plaintiff and intervenor, Peter W. McAllen, were formerly husband and wife, and prior to the commencement of this action had been duly divorced. This action was brought by plaintiff against defendants Hodge to recover damages for the alienation of her husband's affections. Mr. McAllen intervened, setting up a contract whereby, in consideration of $10,000 paid and to be paid, plaintiff released and discharged all claims and causes of action which she had or claimed to have against any and all persons for the alienation of her husband's affections, and agreed not to bring or cause to be brought an action or proceedings against any persons for the recovery of damages on that account. In a former appeal it was held that it was proper for the husband to intervene and set up the contract in defense of plaintiff's cause of action. McAllen v. Hodge, 92 Minn. 68, 99 N. W. 424. After the cause was remanded, plaintiff served an answer to the intervening complaint, whereupon the intervenor moved the court to strike out certain portions thereof, and also moved the court for an order granting a temporary injunction enjoining and restraining plaintiff from prosecuting the action upon the ground that the answer and intervening complaint admitted the execution of the contract of settlement, and that the answer did not show any defense. The trial court granted the motion, in part, to strike out portions of the answer, and also granted the motion for a temporary injunction, and plaintiff appealed from both orders.

It will be unnecessary to review the order of the trial court in striking out portions of the answer, in view of our disposition of the case upon the other question. In substance, the answer alleged that plaintiff and McAllen were married in 1894, living together as husband and wife until December 28, 1901, when they were divorced; that, prior to the granting of the decree of divorce, plaintiff and her husband agreed that if plaintiff would dismiss a prior action pending against the husband for divorce upon the ground of intimacy with defendant Carrie E. Hodge, and commence a new action upon the ground of cruel and inhuman treatment, and would sign the con-

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tract set out in intervenor's complaint, and release all right and claim to alimony, and all rights in and to the property of the intervenor, in consideration therefor the husband would permit an action for divorce upon the ground of cruelty to proceed to judgment without interposing a defense, allowing plaintiff the care and custody of the minor child, and would pay to her the sum of $7,000 in cash, and deliver a bond for $3,000; that the agreement was carried out, the money paid, and the bond delivered, all in pursuance of such prior agreement; that the contract set forth in intervenor's complaint was reduced to writing and executed before service of papers in the new divorce action. There are other allegations in the answer, which are unnecessary to mention at this time.

Upon the former appeal it was held that the contract was upon its face a valid one, and that the husband was entitled to plead it in defense to this action. So the issue made here is this: May the contract, which upon its face appears to be valid, be attacked, and its true character shown, in order that plaintiff may proceed to do that which she had contracted not to do, thus taking advantage of her own wrong? It will be conceded, without argument, that, if the facts set out in the answer to the intervening complaint be true, they show without question the invalidity of the contract, and it was void as against public policy. But will the court lend its aid to plaintiff, under the circumstances of this case, to show the true nature of the contract, for the purpose proposed by her answer? The question thus presented is not free from doubt, but, after a consideration of the general principles involved, we have come to the conclusion that plaintiff has not shown herself entitled to the relief sought.

Adams v. Adams, 25 Minn. 72, was an action upon a promissory note, brought by a divorced wife against her husband. It was held that as a defense he could show the true nature of the transaction—that the note was given in pursuance of an agreement between them respecting alimony, and made for the purpose of facilitating their divorce. It was held that the agreement was illegal and void as against public policy, that the parties had no legal capacity to enter into such contract, and that the true nature of the transaction might be shown for the purpose of disclosing the want of consideration in the note. Plaintiff was not permitted to recover, for the reason that the court would

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go no further than to disclose the true nature of the transaction, and would not extend its aid to either party to enforce any of the provisions of such illegal agreement.

That case does not differ in principle, but this case presents an additional question. In the Adams case the party to the wrong was, through the administration of the courts, attempting to enforce a void agreement, while here the intervenor does not plead the contract of settlement for the purpose of asking any affirmative relief, but as a defense, for the purpose of preventing plaintiff from taking advantage of her own wrong.

The contract is valid upon its face, and was executed, at least in part. While there is some attempt in the answer to show that plaintiff was induced to enter into the arrangement by reason of fraudulent representations on the part of her husband, the facts alleged are not sufficient to indicate that she was influenced into the execution of the contract upon that ground. It clearly appears that she made the settlement advisedly, and, under the facts pleaded, is in no position to attack the contract and secure its cancellation upon the ground of fraud. Nor, upon the facts set forth in the answer, is she in a position to ask a court of equity to cancel the contract upon the grounds of its illegality, without doing equity herself and restoring the money received. Having voluntarily entered into this agreement and received the money, she will not be heard to affirmatively attack it through the medium of a court of equity, unless she comes into court with clean hands. It logically follows that she is in no position to attack the agreement in this, an action at law, when the purpose disclosed by her defense is not alone to resist the enforcement of the contract, but to enable her to act in direct contradiction to its terms. So long as that contract is in existence, it stands in her way; and, in order to get around it, she is obliged to show that the agreement grew out of an illegal consideration, and she seeks to do that in order that she may derive a personal benefit without restoring the money received. Her position in this case is the same as it would be, had she proceeded in a court of equity to have the contract canceled.

We think this conclusion is in accordance with the general principles as established by the authorities and text-writers on the subject. 2 Pomeroy, Eq. Jur. & 941; Ellicott v. Chamberlin, 38 N. J. Eq. 604; Collins v. Blantern, 1 Smith, Lead. Cas. (11th Ed.) 370, and notes.

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The granting of the injunction, while in form affirmative relief, is no more, in effect, than an order for judgment for defendants upon the pleadings.

Order affirmed.

ANNA S. OLSON v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.[1]

February 17, 1905.

Nos. 14,181—(198).

Fall of Passenger from Railway Car.

This is an action to recover for damages which the plaintiff claims she sustained by being jerked from the steps of the defendant's car by its being started while she was in the act of alighting therefrom. *Held:*

1. Her alleged contributory negligence was a question of fact, and the finding of the jury thereon is sustained by the evidence.

2. The damages are not excessive.

3. The plaintiff was entitled to recover damages for all of the direct consequences of her injuries—future as well as past—but only for such future consequences as were shown, to a reasonable certainty, would result from her injuries.

4. There was no reversible error in the charge of the court to the jury, nor in its refusal to charge.

Action in the district court for Mower county to recover $2,000 for personal injuries. The case was tried before Kingsley, J., and a jury, which rendered a verdict in favor of plaintiff for the sum demanded. From an order denying a motion for a new trial, defendant appealed. Affirmed.

Shepherd & Catherwood, for appellant.

Lafayette French, H. H. Dunn, and *Edward P. Kelly,* for respondent.

START, C. J.

The plaintiff, a woman of fifty nine years, was on November 11, 1903, a passenger on one of the trains of the defendant, and was in-

[1] Reported in 102 N. W. 449.

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jured while alighting therefrom on its arrival at her destination—the village of Grand Meadow, this state. This action was brought to recover damages on account of her injuries, which were due, as she alleges in her complaint, to the negligence of the defendant in not stopping its train for a reasonable time to enable her safely to alight, and in suddenly starting the train while she was in the act of alighting. The defendant, by its answer, denied the allegations as to its own negligence, and alleged that the plaintiff's injuries were solely the result of her own negligence. There was a verdict for the plaintiff in the sum of $2,000. The defendant appealed from an order denying its motion for a new trial.

1. The first reason urged why a new trial should be granted, to be considered, is that the verdict is not justified by the evidence, for the reason that the plaintiff was guilty of contributory negligence in attempting to alight from the train while it was in motion. The evidence is not conclusive that the plaintiff attempted to get off the train while it was in motion. The train in question consisted of a baggage and mail car, a smoker, a ladies' car, and the superintendent's car, which was the rear car in the train. Next to it was the ladies' car, in which the plaintiff rode. She entered the car by the rear door, and left it by the same door, as she was sitting near it. There was with her at the time her friend, who had a little girl with her. The testimony of the plaintiff as to the accident was to the effect that when the car reached Grand Meadow the brakeman announced the station, and the train stopped; that she then at once started to leave the train, her friend preceding her, and then followed her child; that when the mother reached the station platform she laid her bundles down and reached for the child; and, further, that the plaintiff was then standing on the first step of the car from its platform, holding the child by her clothes, and, as the mother took her, the train started, and the plaintiff was jerked off the steps, where she was standing, and fell to the station platform and was injured. The plaintiff was corroborated to some extent by other witnesses. There was, however, evidence tending to show that the train was moving before the plaintiff attempted to alight.

It is urged on behalf of the defendant that if the plaintiff was standing on the upper step of the car, and it started with a sudden jerk, she

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could not have been jerked or thrown sidewise down the steps; hence the conclusion follows that she was not thrown down by the starting of the car, but by her voluntary attempt to leave the car after it had started. It is immaterial whether the car started with a sudden jerk or not, if starting it while the plaintiff was in the act of alighting was the cause of her being thrown from the train. There is no such inherent improbability in the testimony of the plaintiff as to require its rejection as untrue. If she were standing on the step of the car, reaching forward, as she must have been in order to hold the child by its clothes, it is not difficult to understand how she could have fallen from the steps of the car to the station platform by being jerked so as to lose her balance by the starting of the car. The distinction between being jerked off the car and falling off by reason of the starting of the car is not, as defendant claims, important. The question of her negligence was one of fact, which the trial court fairly submitted to the jury, and the verdict upon the question is not so manifestly against the preponderance of the evidence as to justify us in interfering with it.

2. It is urged that the damages awarded are excessive. The plaintiff claimed that she was permanently injured by her fall from the car, and that, as a result thereof, she was suffering from a curvature of the spine and a floating kidney. It is reasonably clear from the evidence that the plaintiff was, at the time of the trial, afflicted with a curvature of the spine and a floating kidney; but, upon the question whether either was due to her fall, it is not so satisfactory. If either of the ailments of which the plaintiff complains was occasioned by her fall, it is obvious that the damages are not excessive, for such ailments are permanent, unless remedied by a surgical operation, which the evidence shows would be precarious, in view of plaintiff's age. The opinion evidence as to the question of the cause of these permanent ailments was conflicting, but a consideration of all the evidence relating to the character and cause of the plaintiff's injuries leads us to the conclusion that the evidence was sufficient to sustain a finding by the jury that the floating kidney was caused by the plaintiff being thrown or falling from the car. We accordingly hold that the assessment of damages was not excessive, within the rule governing such questions.

3. The remaining assignments of error relate to the instructions of the court to the jury. The court gave to the jury this instruction:

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> The plaintiff had a right, therefore, as a passenger of the defendant, to be safely carried and safely delivered at her destination by the defendant company; and it was the duty of the defendant company to use the highest degree of care and skill in carrying the plaintiff from Dexter to Grand Meadow, and to use the highest degree of care and skill in seeing that she was safely delivered at her destination at Grand Meadow. These are the general principles of law which apply to all cases where the relation of passenger and carrier exist.

It is the contention of the defendant that this was error, for the reason that it did not state the correct rule concerning the reciprocal duties incumbent upon passengers and carrier. The instruction, as stated by the court to the jury, was a general statement as to the duties of the defendant, and correct as far as it went. The court then proceeded to apply the general principles in a concrete form to the particular facts of the case, and presented the issues and claims of the respective parties, including the alleged negligence of the defendant and that of the plaintiff. Taken as a whole, the charge was a full and correct statement of the reciprocal rights and duties of the parties.

The court also instructed the jury that it was not negligence for the plaintiff to attempt to alight from the rear end of the car. This is assigned as error. The uncontradicted evidence was to the effect that it was proper for passengers to get off at the rear door of the car, and there is nothing in the record to justify a finding by the jury that the plaintiff was in fact negligent in passing out of the rear door of the car. It follows that the instruction was legally correct. It was not, in view of the respective claims of the parties on the trial, an abstract proposition; hence it was not error to give it.

Upon the question of damages the court instructed the jury as follows:

> The plaintiff is entitled to recover, if she is entitled to recover at all, such damages as she has sustained by reason of loss of time, by reason of pain and suffering, by reason of impairment of her ordinary physical faculties, and such as she may sustain in the future by reason of any permanent injury which she has established that she has sustained. There is no rule of law

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by which I can tell you what these damages should or should not be. They cannot be measured exactly in dollars and cents, but they must be determined by the jury, applying your good sense as practical men of affairs. What in your judgment would fairly and reasonably compensate her for the injuries which she has sustained, in case she is entitled to recover?

The defendant claims that this was error, for the alleged reason that it permitted the jury to take into consideration elements of damages which were contingent and speculative; hence the instruction was misleading.

In a personal injury action the plaintiff is entitled to recover damages for all of the direct consequences of his injuries, future as well as past, but he can recover only for such future consequences as are shown, to a reasonable certainty, will result from his injuries. L'Herault v. City of Minneapolis, 69 Minn. 261, 72 N. W. 73; McBride v. St. Paul City Ry. Co., 72 Minn. 291, 75 N. W. 231. It follows from this rule that future consequences which may or are likely to result from the injuries are too speculative to be considered by the jury in the assessment of damages.

It is apparent that the instruction complained of was verbally inaccurate, in that the court used the word "may" instead of "will." This seems to have been done by inadvertence. It is, however, reasonably clear that the jury could not have been misled by the error to the prejudice of the defendant, for future damages were expressly limited to those the plaintiff may sustain "by reason of any permanent injury which she has established that she has sustained." This by necessary implication excludes all uncertain and speculative damages, for, under the instruction, the jury, in order to give any damages for future consequences of her injury, were required first to find that she had established that it was permanent. However, if counsel deemed the instruction misleading or liable to prejudice the defendant, he should have called the court's attention to the matter, so that the mistake might have been corrected before the jury retired. This was not done, nor was there any exception to the giving of the instructions at the trial. Steinbauer v. Stone, 85 Minn. 274, 88 N. W. 754. We hold that the giving of the instructions was not reversible error.

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It is further urged that the trial court erred in refusing or modifying the defendant's seven requests for instructions to the jury. We have considered each of these requests, with reference to the general charge of the court, and find that those refused which correctly stated the law were fairly and substantially covered in the general charge, and that the others either did not state the law of the case correctly or were argumentative. The defendant's first request was to the effect that, if the plaintiff received her injuries while in the voluntary act of alighting from the train, she could not recover. This the court gave, and followed it by the following instruction:

> Of course, it necessarily follows from what I have stated here that if the plaintiff attempted to alight from a moving train —that is to say, knowing that the train was moving,—if she jumped off the train voluntarily, she would not be entitled to recover. She bases her action upon the proposition that she fell from the train, and that is a subject of dispute between the parties—whether she fell from the train, or whether she voluntarily alighted from the train while it was in motion.

The giving of the added instruction is assigned as error. Taken as a whole, we find no error in it. The charge of the learned trial court, as a whole, was a fair, full, and correct statement of the issues between the parties, and the law applicable thereto.

Order affirmed.

MERCHANTS NATIONAL BANK OF ST. PAUL v. CITY OF EAST GRAND FORKS.[1]

February 17, 1905.

Nos. 14,185—(207).

Statute Constitutional.

Chapter 382, p. 690, Laws 1903, entitled "An act relating to public improvements heretofore or hereafter made in all villages and in cities of ten thousand or less inhabitants, to the levying of assessments to defray the expenses thereof, and to the issuance of evidence of indebtedness in anticipation of their collection," is not obnoxious to the constitutional pro-

[1] Reported in 102 N. W. 703.

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vision that "no law shall embrace more than one subject, which shall be expressed in its title."

Right to Existing Defenses.

A vested right to existing defenses is under the protection of the law, save only as to those defenses which are based on informalities not affecting substantial rights, which do not touch the substance of the contract, and are not based on equity or justice.

Legislative Authority over Municipalities.

The state can compel any of its political subdivisions to recognize and pay obligations which were not cognizable in any court of law, but which are based upon considerations so thoroughly equitable and moral as to deserve and receive favorable legislative consideration.

Decision of Arbitrator.

A decision of a person designated in a contract as the final arbitrator as between the parties to that contract is conclusive upon them, in the absence of fraud or of such gross mistake as would necessarily imply bad faith, or of failure to exercise honest judgment.

Compulsory Payment of Warrants.

An act of the legislature may constitutionally require a city to pay a third person, to whom a contractor assigned outstanding warrants, signed by a mayor and indorsed by the city treasurer as payable in the future, which are based on estimates issued by a city engineer, upon whom the contract confers large, if not conclusive, powers of determination, and approved by the city council.

Curative Act.

The curative effect of such an act is here held applicable to the right of recovery based on a detailed examination of the legal effects of the facts that the warrants exceeded the statutory limits of city indebtedness; that no money was in the city treasury to pay the warrants, and no provision made for obtaining it; that no bond was given, as required by statute, to pay claims for work and material; and of the legal effect of the claim that the contract was not performed, and that the work done was of no value, but was a positive injury, to the city.

Appeal by defendant from a judgment of the district court for Polk county, entered pursuant to the findings and order of Watts, J. Affirmed.

F. C. Massee, G. A. E. Finlayson, and *A. A. Miller,* for appellant.

Davis, Kellogg & Severance, for respondent.

JAGGARD, J.

This was an action brought against the city of East Grand Forks to recover on certain warrants issued by that city, with interest.

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That city entered into a contract for paving certain streets with one Thornton. As the work progressed, estimates due and payable in the succeeding month were furnished by the city engineer, and were allowed by the city council. Upon them, six warrants on the city treasurer, aggregating $8,000, were issued to the contractor, and in course of time were duly presented for payment. Payment was refused for lack of funds. The treasurer indorsed the warrants as registered, and as drawing interest until presented for payment. These warrants were pledged to the plaintiff as collateral security for loans, and became its absolute property through foreclosure proceedings.

The defenses interposed were (1) the illegality of the contract; and (2) the contractor's failure to perform. Upon the trial the court made rulings as to the evidence, and finally based its findings of fact and conclusions of law and order for judgment for the plaintiff, in the full amount claimed, upon the proposition that the contract was validated and the warrants legalized by section 9, c. 382, p. 695, Laws 1903. The exceptions taken by the defendant at the time of the trial, and its assignments of error here, present clearly and fully to this court the question of the correctness of that ruling.

1. The first contention of the defendant was that the learned court below was in error, because the law itself was unconstitutional, inasmuch as it conflicts with section 27, article 4, of the state constitution: "No law shall embrace more than one subject, which shall be expressed in its title." The title of the act is as follows:

> An act relating to public improvements heretofore or hereafter made in all villages and in cities of ten thousand or less inhabitants, to the levying of assessments to defray the expenses thereof, and to the issuance of evidence of indebtedness in anticipation of their collection.

The first eight sections of the chapter provide procedure for cities and villages of less than ten thousand inhabitants in making improvements in general, and also provide for payment by means of local assessments. Section 9 reads as follows:

> Whenever any village or city within the purview of this act has heretofore made or caused to be made any such improvement or has issued evidences of indebtedness to defray the cost of

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any such improvement in whole or in part, all undertakings and agreements and all proceedings of whatever nature had or made by it with reference to such improvement, and any such evidence of indebtedness are hereby validated and legalized; and such village or city is hereby empowered to complete the same, to pay any such evidences of indebtedness already issued, and to provide funds for the completion of any such improvement by proceeding as in this act provided.

One objection to the title of the act is based on its argued failure to give to any person interested reasonable notice of the character of the legislation, and to set forth that the act legalizes any contract or suspends the operation of laws limiting the indebtedness of cities. An examination of the title, however, shows that it clearly and adequately indicates the subject-matter which follows, and is well designed to subserve purposes of indexing. It expressly refers to improvements "heretofore or hereafter made." The first eight sections relate to improvements thereafter made; the ninth section, to improvements theretofore made. The title does not set forth the whole of the statute, nor is this essential. The courts have inclined to a reasonable, but liberal, construction of the constitutional inhibition. It is sufficient if the title is "fairly suggestive." "It was not intended to embarrass legislation by making laws more restrictive in their scope and operation than is reasonably necessary in order to conserve the purpose for which the constitutional limitation was adopted." Winters v. City of Duluth, 82 Minn. 127, 84 N. W. 788; Ek v. St. Paul Permanent Loan Co., 84 Minn. 245, 84 N. W. 844; State v. Board of Control, 85 Minn. 165, 88 N. W. 533; State v. Board of Co. Commrs. of Renville County, 83 Minn. 65, 85 N. W. 830; Lien v. Board of Co. Commrs. of Norman County, 80 Minn. 64, 82 N. W. 1094; State v. Cassidy, 22 Minn. 312.

The second objection to the title, on the ground of duplicity, is not well taken. The act, taken as a whole, provides a complete code to be followed by cities of a certain class with respect to public improvements. It was designed to enable such cities to extricate themselves from preceding complications (section 9), and to proceed in the future in an orderly and effective way (sections 1 to 8). Section 9 is entirely germane to the general subject. "To constitute duplicity of subject," said Justice Mitchell in Johnson v. Harrison, 47 Minn. 575, 50 N. W.

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923, "an act must embrace two or more dissimilar and discordant subjects, that by no fair intendment can be considered as having any legitimate connection with or relation to each other." And see In re Piedmont Avenue East, 59 Minn. 522, 61 N. W. 678; State v. Starkey, 49 Minn. 503, 52 N. W. 24; City of Crookston v. Board of Co. Commrs. of Polk County, 79 Minn. 283, 82 N. W. 586.

2. The second contention of the defendant was that a vested cause of action is beyond legislative impairment, and that a vested right to an existing defense is equally protected, saving only those which are based on informalities not affecting substantial rights, and which do not touch the substance of the contract, and are not based on equity and justice. Justice Matthews, in Pritchard v. Norton, 106 U. S. 124, 132, 1 Sup. Ct. 102; and see Farnsworth L. & R. Co. v. Commonwealth T. I. & T. Co., 84 Minn. 62, 86 N. W. 877. Because, "in the nature of things, there can be no vested right to violate a moral duty or to resist the performance of a moral obligation." Grinder v. Nelson, 9 Gill (Md.) 299.

The decision of this branch of the case is not, however, determined by limitations placed by the constitution upon the power of the legislature to affect private property. The question here is whether the state legislature has the power to impose upon a municipal corporation the payment of certain disputed obligations. The result of the exercise of that discretion is upon taxation. Now, it is well settled that the power which the legislature may "exercise over the revenues of the state it may exercise over the revenues of a city for any purpose connected with its present or past condition." Justice Field in New Orleans v. Clark, 95 U. S. 644, 654. In following this case, Justice Peckham says in Guthrie Nat. Bank v. Guthrie, 173 U. S. 528, 537, 19 Sup. Ct. 513: "In the exercise of this jurisdiction over municipal corporations by the state or by the territorial legislature, no constitutional principle is violated. It is a jurisdiction which has been customarily exercised ever since the foundation of the government, and is based upon the power of the state, as sovereign, to itself recognize, or to compel any of its political subdivisions to recognize, those obligations which, while not cognizable in any court of law, are yet based upon considerations so thoroughly equitable and moral as to deserve and compel legislative recognition." And in Utter v. Franklin, 172 U. S. 416, 19 Sup. Ct.

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183, there was sustained the action of Congress in validating bonds issued by a territory, declared void because not necessary to the administration of internal affairs, Lewis v. Pima County, 155 U. S. 54, 15 Sup. Ct. 22, in a suit brought before the passage of the curative act.

This principle has been recognized and enforced in this state. State v. City of Lake City, 25 Minn. 404; Kunkle v. Town of Franklin, 13 Minn. 119 (127); and see Nash v. Lowry, 37 Minn. 261, 33 N. W. 787; Flynn v. Little Falls E. & W. Co., 74 Minn. 180, 77 N. W. 38, 78 N. W. 106; People v. Burr, 13 Cal. 343; Town v. Board, 13 N. Y. 143; Grover v. Inhabitants, 11 Allen, 88; Bartholomew v. Town, 33 Conn. 408; Booth v. Town, 32 Conn. 118; Freeland v. Hastings, 10 Allen, 570; Schofield v. Watkins, 22 Ill. 66; Read v. Plattsmouth, 107 U. S. 568, 2 Sup. Ct. 208; U. S. v. Realty Co., 163 U. S. 427, 16 Sup. Ct. 1120.

The immediate question to be here decided is whether the legislature has the power to cure the defects involved in these warrants, eliminate the defenses herein interposed, and require the city to discharge these particular obligations. That the contract was void for three reasons was contended by defendant and denied by plaintiff:

1. There was no money in the treasury to pay the warrants, and no provision made for securing it, as required by the law under which defendant was incorporated. This statute, however, expressly excepts cases otherwise therein provided for. Here the contract is to be paid by local assessment. Therefore it was argued that the vitiating provision does not apply. See Comstock v. Incorporated Village, 61 Oh. St. 288, 56 N. E. 15.

2. No bond was given to secure claims for work and material, as required by chapter 321, p. 535, Laws 1901. But no such claims appear unpaid, and an adequate bond was given the city, which protected fully.

3. The warrants created an indebtedness in excess of amount prescribed for the city. It was impliedly conceded that the curative law is valid so far as it affects all the objections of the defendant on these grounds.

It was further contended, however, that the curative act did not serve to eliminate the objection that the contractor failed to perform his contract, that there was no consideration for the warrants, and that

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the work done was not only of no value, but was an injury, to the city. That contract and the specifications, construed as a whole, made the city engineer the sole arbitrator both of requirements and of performance, subject, however, to the effect to be given one clause. That clause provided that there should be retained twenty five per cent. of estimates given by the engineer as the work progressed, and that no estimate should be considered as an acceptance of any work which might prove defective before the final acceptance of the whole. This provision is to be given a restrictive construction. The present action is not upon a completed contract. The city defaulted. Accordingly, with much show of justice, the plaintiff urged that this case fell within the well-settled rule, of almost universal acceptance, that the provisions of a contract constituting a designated person as the final arbitrator are valid and enforceable. His decision in any matter within his authority under the terms of the contract is conclusive upon the parties, in the absence of fraud or of such gross mistake as would necessarily imply bad faith, or of failure to exercise honest judgment. Justice Harlan, in Kihlberg v. U. S., 97 U. S. 398, and Chief Justice Waite, in Sweeney v. U. S., 109 U. S. 618, 3 Sup. Ct. 344; and see St. Paul & N. P. R. Co. v. Bradbury, 42 Minn. 222, 44 N. W. 1; Langdon v. Northfield, 42 Minn. 464, 44 N. W. 984; King v. City of Duluth, 78 Minn. 155, 80 N. W. 874; and many similar cases collected in brief for plaintiff.

Moreover, the estimates, issued by the engineer and certified to by him and by the city council, were taken up by the city authorities, and in lieu thereof warrants were issued, signed by the mayor, and indorsed by the city treasurer as payable, with interest, in the future.

This examination has been made along the lines of the contentions and concessions of counsel, not to ascertain whether or not defendant was entitled to prevail on the merits, but to make specific the subject-matter to which this curative act is here to be applied, and to make possible an exact determination of the constitutional propriety of such an obligation. The curative act is accordingly valid, as concerns its legalizing effect, on both technical and nontechnical defenses, because it is the exercise of the unquestioned discretion of the legislature in requiring a municipal corporation to pay a disputed obligation.

Judgment affirmed.

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JOHN KELLY v. PATRICK DALEY.[1]

February 17, 1905.

Nos. 14,188—(170).

Trespass.

Findings of the trial court *held* to show that the trespass complained of by plaintiff was committed upon the land described in the complaint, and the judgment appealed from is affirmed.

Action in the district court for Dakota county to recover from defendant $50 for trespass upon land, the alleged damages consisting of the destruction of a fence and the cutting and removing of certain trees. The case was tried before Crosby, J., who found in favor of plaintiff for the sum of $15. From a judgment entered pursuant to the findings, defendant appealed. Affirmed.

William H. Gillitt, E. A. Whitford, and *Albert Schaller,* for appellant.

Hodgson & Lowell, for respondent.

BROWN, J.

The facts in this case are as follows: Plaintiff and defendant own adjoining farms. At the time stated in the complaint defendant tore down and destroyed a fence claimed by plaintiff to have been erected by him upon the boundary line between their respective farms, and he brought this action to recover damages for the trespass. The complaint alleged that plaintiff was the owner of the land mentioned therein, which was described by government subdivisions, and that the acts of trespass complained of were committed thereon to plaintiff's damage. The answer is, in effect, a general denial. There is no question, from the evidence, that defendant committed the acts charged by plaintiff. The controversy between the parties is whether the fence was upon the boundary line between the two farms. Whether it was, or was not, was practically the sole issue tried in the court below. The trial was before the court without a jury, and it found that plaintiff had been for more than sixteen years prior to the commencement of the action the

[1]Reported in 102 N. W. 858.

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owner of the land described in the complaint; that in the month of June, 1902, defendant entered thereon and destroyed forty rods of fence, to plaintiff's damage in the sum of $10; and that he destroyed certain trees growing upon the land, to plaintiff's damage in the sum of $5. Judgment was ordered for the plaintiff accordingly, from which defendant appealed.

The principal point made by defendant on this appeal is that the acts of trespass complained of by plaintiff were not committed upon the land described in the complaint, but upon a strip of land adjoining thereto, title to which, if in plaintiff at all, was acquired by him by adverse possession, and is not included in or covered by the government subdivisions described in the complaint. Objections were made in the court below to the admission of any evidence tending to prove plaintiff's ownership of this strip by adverse possession, and it is urged in this court that the court below erred in overruling the objections, and erred also in finding that the acts of trespass complained of were committed on the land described in the complaint.

As we have already suggested, the issues presented by the pleadings narrowed down on the trial to the question whether the fence in controversy was upon the true boundary line between the adjoining farms. Evidence was introduced by defendant tending to show that the fence was not upon the line as fixed by the government survey, but, instead, some twenty feet therefrom upon the land owned by him; while that offered by plaintiff tended to show that a fence was erected on the line where the fence in controversy stood, some thirty or forty years ago, and had been recognized by the owners of the land preceding the ownership of the parties to this action as the true boundary line. This evidence was properly received, and from it the court below was required to determine whether the fence torn down by defendant was or was not upon the boundary line between the two farms. The findings of fact referred to above—that defendant entered upon the land of plaintiff and broke down and removed the fence, and committed other acts of trespass thereon—are, in effect, that the fence was upon the true boundary line, and the acts of trespass are thereby found to have been committed upon the land described in the complaint. If the line contended for by defendant was the line fixed by the government survey, he should, by proper application for modified findings, have re-

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quested the court so to find; had he done so and the court had found with him, the question argued on this appeal would have been squarely presented. But no such application was made, and we are controlled in the determination of the case by the findings, which, in effect, locate the trespass on the land described in the complaint.

It appears that the fence in question was erected a great many years ago for a distance of about thirty rods to a point on the lake shore, and it may be that it was not erected on the true boundary line. It was not originally extended through the lake, which has since become nearly dry; and what the rights of the parties are respecting this line beyond the shore and through the lake bed, we need not determine. The acts of trespass principally complained of were committed north of the lake. The question whether the line should be extended parallel with the fence erected years ago, and through the lake, which does not appear to have been meandered, is a question which must be determined in some other case. If the line on which the fence was originally constructed became the boundary line by acquiescence of the parties, it does not necessarily follow that it should be extended in a direct course through the lake bed. Benz v. City of St. Paul, 89 Minn. 31, 93 N. W. 1038.

The errors assigned on this appeal are not sufficient to justify a reversal of the case, in view of the effect we must give to the findings of the trial court, and the judgment appealed from is affirmed.

On March 10, 1905, the following opinion was filed:

PER CURIAM.

What was said in the original opinion respecting an extension of the boundary line through the lake bed on a line parallel with the old fence was in view of the probability that the line north of the lake became fixed as such by acquiescence of the parties, and not with a view of deciding the question. While the record is somewhat confused as to the precise location of the trespass complained of, we assumed, from what the trial court said on the trial, that the fence removed by defendant was built on the line of the old one, and north of the lake. We quote for the purpose of explanation what was said on the trial during the examination of plaintiff as a witness:

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> The Court: Let me see if I understand this right. The fence that was pulled up commenced at the southeast corner— Mr. Gillitt: No, sir— The Court: It commenced at the lake and extended north forty rods. This was a pasture fence, and commenced at the lake and extended north forty rods? A. Yes, sir.

We took this to be a summing up of the exact situation, and as disclosing the real controversy between the parties.

But whether the fence destroyed was, as contended on the application for a rehearing, partly within the lake and partly north of it, can make no difference on this appeal. The controversy between the parties was the true boundary line between the adjoining tracts of land, and the trial court, in effect, found that the one contended for by plaintiff was such line. Defendant's whole case rests upon the claim that the line claimed by plaintiff was not the one fixed by the government survey. But the evidence offered by him tending to show the government line is not conclusive. The findings of the trial court are general, that the allegations of the complaint are true—in effect, that the line claimed by plaintiff was the true one—and no specific findings were requested. Just what the court based the findings upon—whether upon the theory that the line claimed by plaintiff was the true government line, or had become the boundary by acquiescence of the parties—does not appear; and, in the absence of specific findings, disclosing the grounds of its decision, we cannot say that it erred in its general conclusions.

Application for rehearing denied.

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JOSEPH HEBERT v. INTERSTATE IRON COMPANY.[1]

February 17, 1905.

Nos. 14,220—(220).

Negligence—Contributory Negligence—Requests to Charge.

Personal injury action to recover damages sustained by the plaintiff by falling into an uncovered and unguarded ditch. *Held:*

1. The alleged negligence of the defendant and the contributory negligence of the plaintiff were made by the evidence questions of fact for the jury.

2. Requested instructions, though correct, need not be given to the jury by the court if they are fairly and substantially covered by the general charge. Certain requests by the defendant were rightly refused for this reason.

3. Where requests are argumentative or prolix, repeating in different language substantially the same propositions, thereby giving undue prominence and emphasis to the claims of the party making them, it is a fairer and better practice for the court to refuse them, and to give correctly and concisely in its general charge the propositions of law embraced in the requests.

Appeal by defendant from an order of the district court for St. Louis county, Dibell, J., denying a motion for judgment notwithstanding the verdict or for a new trial. Affirmed.

Davis & Hollister, for appellant.

Alexander Marshall, J. De La Motte, and *Warner E. Whipple,* for respondent.

START, C. J.

This is an appeal in a personal injury action from the order of the district court of the county of St. Louis denying the defendant's motion for judgment notwithstanding a verdict for $3,500 in favor of the plaintiff, or for a new trial.

The evidence given on the trial was conflicting upon several material matters. There was, however, no substantial controversy as to the following facts: The defendant operated an iron mine located approximately a mile and a quarter northeast of the city of Virginia.

[1] Reported in 102 N. W. 451.

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The shaft of its mine and the power house are opposite each other, and one hundred ninety five feet apart. Southeasterly from the shaft, and two hundred fifty feet therefrom, is its dryhouse, wherein the miners, on coming out of the mine, change their clothing; leaving their working clothes to be cleaned and dried. There were two railway side tracks running between the shaft and the power house, laid upon an embankment raised some five feet above the surface of the ground. Its nearest rail to the shaft was four feet, and from the center of the shaft to the center of the track furthest away was twenty seven feet. On November 27, 1901, the defendant commenced the construction of a ditch from the power house to the shaft for the purpose of laying therein water and steam pipes, and completed the ditch about December 15 following. The ditch through the railway embankment was some seven feet deep, and from four to five feet wide, and from the embankment to the power house it was two feet wide and deep. There were employed by the defendant in and about the mine some fifty men, about half of them miners. The plaintiff was a man fifty years old, a common laborer, who was accustomed for some years to chop in the woods and work around iron mines. He entered the employment of the defendant November 23, 1901, as a dryman; that is, he was one of two men who had charge of the dryhouse and the miners' clothing; one being on duty during the day, and the other at night. The plaintiff's hours of service when on duty were approximately from six o'clock in the evening until seven o'clock in the morning. He was in charge of the dryhouse at night for some five days next before he was injured. Twenty-seven days after he entered the defendant's service, and on the morning of December 20, at about 5.30 o'clock, he left the dryhouse to go to his boarding house, in Virginia. He walked to the railroad track, and then followed it until he came to the ditch, which was not covered at this point, and fell into it, whereby his leg was broken. There were no lights or barriers or anything to warn persons walking on the railroad track of the open ditch. The plaintiff had nothing to do with the construction of the ditch.

In addition to these conceded facts, the plaintiff testified that he had no previous knowledge of the existence of the ditch through the railway embankment. He admitted that he saw a ditch being dug near

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the power house, and piles of dirt being thrown out on the sides thereof. No dirt was left on the railway embankment. He admitted the route he followed on the morning of the accident was not the usual one taken by him, but he testified that his usual route had become slippery at one point by reason of ice. The morning was cold, and he pulled his cap down, and did not look up until he fell into the ditch.

There was evidence tending to show that miners and other employees at times followed the railway tracks past the shaft in going to and from their work. There was evidence on the part of the defendant tending to show that the mouth of the shaft and railway embankment and tracks were in plain view of the dryhouse, in and around which the plaintiff worked at times in the daytime, and that he must have known of the existence of the ditch and its condition before he fell into it, and, further, that the defendant had no knowledge that any of the employees who worked nights used the route taken by the plaintiff. There was no evidence tending to show that the defendant ever directed the route its employees should follow in going to and from their work. The negligence alleged in the complaint is, in effect, that the defendant failed to cover the ditch, or put out any lights or barriers or any other danger signal.

The defendant's assignments of error raise the questions: Was the defendant, upon the record, entitled to a directed verdict in its favor? If not, was it entitled to a new trial?

1. It is the claim of the defendant that it was entitled to a directed verdict for the reason that, as a matter of law, it was not guilty of any negligence, but the plaintiff was guilty of negligence contributing proximately to his injury.

The uncovered ditch across the railway embankment, without any barriers, lights, or other danger signals, was a dangerous pitfall to any one walking in the dark along the railway tracks in ignorance of its existence. The question whether the defendant was or was not negligent in leaving the ditch as it was left does not depend upon whether it, or any one representing it, had any actual notice or knowledge that its employees were accustomed to walk upon the embankment at the point where the plaintiff was injured. If the defendant knew, or might have known by the exercise of ordinary care, that any of its employees working at night were accustomed to use the

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route taken by the plaintiff, or that they might reasonably be expected to do so, and that, if they did, they were liable to fall into the uncovered ditch, it would be negligence on the part of the defendant if it failed to use due care to guard against such an accident. Christianson v. Chicago, St. Paul, M. & O. Ry. Co., 67 Minn. 94, 69 N. W. 640. The trial court correctly submitted the questions of the defendant's negligence upon this hypothesis, for the evidence was sufficient to justify a finding by the jury to the effect that the defendant, in the exercise of ordinary care, should have anticipated that some of its employees, including the plaintiff, might, in the dark, pass along the embankment and fall into the ditch if some warning of its existence were not given. Therefore the question as to the defendant's negligence was one of fact. The question of the plaintiff's contributory negligence was also one of fact. While the evidence tends quite forcibly to show that he must have known of the existence of the ditch, and, so knowing, might have avoided falling into it by the exercise of ordinary care, yet it is not conclusive. It follows that the defendant was not entitled to an instructed verdict.

2. The assignments of error as to the defendant's claim that it was, in any event, entitled to a new trial, relate to the refusal of the court to give certain instructions to the jury. While a party is entitled to have his request for instructions given which, in form and substance, correctly state the law applicable to the case, yet he is not entitled to have them given in the language used by him. It is sufficient if the court fully covers the requested instructions in its general charge. Where such requests are prolix, repeating in different language substantially the same propositions, and thereby giving undue prominence and emphasis to the claims of the party making them, it is the better and fairer practice for the court to give concisely in its general charge the propositions of law embraced in the requests. Schultz v. Bower, 64 Minn. 123, 66 N. W. 139. The defendant in this case made seventeen special requests for instructions. We are of the opinion, based upon a consideration of the general charge in connection with the requests refused, that the general charge fully and fairly covered so much of such requests as the defendant was entitled to have given. We discover no reversible error in the record.

Order affirmed.

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FIRST NATIONAL BANK OF ST. CLOUD v. GEORGE LANG and Another.[1]

February 24, 1905.

Nos. 13,806—(216).

Frivolous Answer.

When a complaint alleges the execution of a promissory note by defendant, and the answer contains a general denial and new matter not constituting a defense in law, that answer should be stricken out on motion, as sham and frivolous, if it be made clearly and indubitably to appear, as by defendant's own admitted letters, that he did execute and promise to pay the note.

Accommodation Note.

That a note was made solely for the accommodation of a third person, for no valid consideration passing to the maker, is no defense to an action by the holder thereof, with notice of these facts, at the time of delivery, who has, in the regular course of business and for value, taken it before its maturity.

Consideration.

A benefit accruing to the person accommodated is a sufficient consideration to sustain the liability of the accommodation maker or indorser.

Review of Discretionary Orders.

Purely discretionary orders are reversible only upon the ground of an abuse of discretion. An order concerning leave to amend pleadings is within this class.

Action in the district court for Stearns county to recover $2,409.07 and interest upon a promissory note executed by defendant Lang and indorsed and guarantied by defendant C. E. Clarke. The answer of defendant Lang, who alone appeared, was on motion stricken out by the court, Baxter, J., as sham and frivolous, and thereafter the court denied defendant permission to serve a proposed amended answer. From a judgment entered in favor of plaintiff as for want of an answer, defendant appealed. Affirmed.

A. E. Clark, for appellant.

Reynolds & Roeser, for respondent.

[1] Reported in 102 N. W. 700.

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JAGGARD, J.

This is an appeal from a refusal by the trial court to allow an amended answer to be filed in lieu of the original, which the court had stricken out as sham and frivolous.

The complaint sets forth a promissory note to respondent, signed by appellant, and guarantied and transferred to respondent by another defendant, named Clarke. The original answer, besides pleading the general issue, sets forth that the note was executed by appellant solely for the accommodation of said Clarke, and without consideration, and that these facts were well known to respondent at the time the note was transferred to it. This answer respondent moved to strike out as sham and frivolous, on affidavits denying said new matter in the answer, and setting forth that the note in suit was given as a renewal of the two other notes signed and delivered by the same parties, and that, after its maturity and frequent demands to pay, appellant wrote three letters acknowledging the debt, and promising to pay or arrange this note. The appellant filed a counter affidavit, stating at length a series of business transactions between him and Clarke relating to sale of Clarke's horses by him, and to the payment of his indebtedness for them by his deposit with Clarke of notes received by him from the persons to whom he sold the horses. The court granted the motion to strike out the answer as sham and frivolous.

Thereupon appellant moved for leave to file an amended answer. The proposed amended answer pleaded the general issue, alleged in greater detail the transactions between appellant and Clarke, and was in all other respects substantially the same as, and consistent with, the original answer, excepting in this: That it alleged that the note in suit was signed and executed by appellant solely for the accommodation of plaintiff and also of defendant Clarke, instead of for the accommodation of Clarke only, as set forth in the original answer. This difference does not affirmatively appear to have been called to the attention of the trial court, nor was it emphasized here. The court denied the motion, judgment was entered for plaintiff, and this appeal was then taken.

1. The legal sufficiency of defenses to an action to put a promissory note into judgment is ordinarily determined by demurrer, or some appropriate form of motion specifically directed thereto. The truth or

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falsity of such defenses is normally tried by a jury, with full opportunity for producing, examining, and cross-examining witnesses. Courts properly refuse to try cases on affidavits. A motion to strike out an answer as sham and frivolous will therefore be granted only in extraordinary cases, in which the propriety and necessity of so doing is clear and free from doubt. Wright v. Jewell, 33 Minn. 505, 24 N. W. 299. And mere affidavits simply denying the facts alleged in the answer, and asserting their falsity, are insufficient foundation for such an order. City Bank v. Doll, 33 Minn. 507, 24 N. W. 300. But where the falsity of the essential facts of a pleading is certainly and indisputably shown, especially when they fail in legal sufficiency, the courts will not permit that pleading to delay or obstruct the administration of justice, but will, on motion, strike it out as sham and frivolous. Morton v. Jackson, 2 Minn. 180 (219); Barker v. Foster, 29 Minn. 166, 12 N. W. 460; Van Loon v. Griffin, 34 Minn. 444, 26 N. W. 601; Stevens v. McMillin, 37 Minn. 509, 35 N. W. 372; Dobson v. Hallowell, 53 Minn. 98, 54 N. W. 939.

The trial court properly granted the motion to strike out appellant's answer. That answer contained a general denial. Therefore respondent could not demur, nor move for judgment on the pleadings. Its motion was a proper one. The letters of appellant show the falsity of the general denial, and establish the genuineness of the respondent's claim. He expressly admits them. The new matter set up in the answer—the explanatory statements of his affidavits—tends only to support the alleged defense that the note was executed without consideration and as accommodation paper, and it may be admitted that this was known to respondent. This does not make out a defense. No evidence to maintain it would have been received on the trial, as against the plaintiff, who took the note in the regular course of business before its maturity. A benefit accruing to the person accommodated is a sufficient consideration to sustain the liability of the accommodation maker or indorser. Tourtelot v. Reed, 62 Minn. 384, 64 N. W. 928; Rea v. McDonald, 68 Minn. 187, 71 N. W. 11; 7 Cyc. 723; 2 Current Law, 1027, 1028; Wedge v. National (Colo. App.) 73 Pac. 873; Boughner v. Meyer, 5 Colo. 71; Hill v. Coombs, 93 Mo. App. 264. See also State v. Hayes (S. D.) 92 N. W. 1068. The answer was frivolous, within the test that, if true, it does not contain any defense to any

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part of the plaintiff's cause of action, and its insufficiency as a defense is so glaring that the court can determine it upon a bare inspection, without argument. Nichols v. Jones, 6 How. Pr. 355.

2. The court properly exercised its admitted discretion in denying the motion to file an amended answer, which, if consistent with the original, did not set forth a defense, and which, if inconsistent, for that reason had no standing of its own, and justified the court's refusal. "Admitting, without deciding, that the proposed amended answer was an improvement upon its predecessor, the court below did not abuse its discretion when it denied defendant's motion for leave to amend, made after the original answer had been shown to be sham and false, and had been stricken out for these reasons." Hertz v. Hartmann, 74 Minn. 320, 322, 77 N. W. 232. "Purely discretionary orders, under the rule universally adopted, are reviewable only upon the ground of an abuse of discretion." An order concerning leave to amend pleadings is within this class. 2 Shipman, Pr. § 919, pp. 1151, 1152.

Judgment affirmed.

HERMAN J. FRITZ v. HERMAN FRITZ and Others.[1]

February 24, 1905.

Nos. 14,130—(179).

Reformation of Instrument.

Before a court of equity will interfere to reform a written instrument, it must appear, substantially as alleged in the pleadings, that there was in fact a valid agreement sufficiently expressing in terms the real intention of the parties; that there was in fact a written contract, which failed to express such true intention; and that this failure was due to mutual mistake, or to mistake of one side and fraud or inequitable conduct of the other.

Evidence to Warrant.

These facts must be established by competent evidence, which is consistent and not contradictory, clear and not equivocal, convincing and not doubtful. Mere preponderance of testimony is not sufficient.

[1] Reported in 102 N. W. 705.

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To Whom Granted.

Such relief will be extended to those only who have not by their conduct (as laches, negligence, or otherwise) put themselves in such a position as to render it unjust to change the situation, especially when such change might injuriously affect the rights or status of innocent third parties.

Pleadings and Evidence Insufficient.

In this case a court of equity will not reform a contract and deeds running to a complainant (unable to read or write the English language) and also to another person so as to make the former sole grantee as to a part of the land described therein, because the pleadings and evidence show failure to comply with any of these conditions precedent to such relief.

Appeal by plaintiff from an order of the district court for Chippewa county, Qvale, J., denying a motion for a new trial. Affirmed.

Mead & Robertson, for appellant.

C. A. Fosness and *B. H. Bowler,* for respondents.

JAGGARD, J.

This is a proceeding to reform a certain contract and deeds on the ground of an alleged mutual mistake.

On June 16, 1896, the owner of certain lands signed a crop contract for sale of one quarter in a section 27 and of another quarter in a section 28 to Herman J. Fritz, the appellant here, and the plaintiff in the court below. Subsequently some unknown person—without authority traced to plaintiff—inserted as an additional grantee the name of defendant Herman Fritz, the father of plaintiff. This was done after the delivery of the contract, and apparently before an attempt was made to record it. That attempt failed. Thereupon the father signed the contract which the plaintiff had previously signed. It was thereupon witnessed and acknowledged on May 26, 1897, and was recorded on June 7, 1897. On May 25, 1901, the vendor delivered two deeds, both running to father and son, the one conveying the quarter in section 27 and the other the quarter in section 28. To secure the unpaid purchase price, both the son and the father (the mother joining) executed four mortgages on May 25, 1901. This action was brought on December 9, 1903, by plaintiff against Herman Fritz and the vendor of the land who disclaimed, and against defendants Fred. Hodgdon and wife and M. C. Bowler, who claim under execution sales on judgments against Her-

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man Fritz. The amount of the value of the land is considerably greater than the amount of the claim of the defendants.

The action was tried by the court without a jury. At the close of plaintiff's testimony both parties rested. The action was dismissed by the court. From an order denying motion for new trial, plaintiff appealed.

The determination of the issues in this case involves the application of well-settled and elementary doctrines of equity. (a) Before a court of equity will interfere to reform a written instrument it must appear, substantially as alleged in the pleadings, that there was in fact a valid agreement sufficiently expressing in terms the real intention of the parties; that there was in fact a written contract which failed to express such true intention; and that this failure was due to mutual mistake, or to mistake of one side and fraud or inequitable conduct of the other. (b) These facts must be established by competent evidence, which is consistent and not contradictory, clear and not equivocal, convincing and not doubtful. Mere preponderance of testimony is not sufficient. (c) Such relief will be extended to those only who have not by their own conduct (as laches, negligence, or otherwise) put themselves in such a position as to render it unjust to change the situation, especially when such change might injuriously affect the rights or status of innocent third parties. 2 Current Law, 1492, 1493, 1496, 1497; Bishop, Cont. §§ 707, 710; Mikiska v. Mikiska, 90 Minn. 258, 95 N. W. 910; Williamson v. Carpenter, 205 Pa. St. 164, 54 Atl. 718. These principles are so obvious and elementary as to render further citations unnecessary. The plaintiff has failed to bring his case within any of these rules.

1. The allegations of his petition are in material matters partially confirmed and partially contradicted by the testimony. The petition alleges ownership of the quarter in section 28 by himself exclusively, and the quarter in section 27 jointly by him and his father. Some proof tended to show ownership of this quarter in section 28 by him exclusively and the other quarter by his father exclusively. Other proof tended to show claim of exclusive ownership by him of both quarters.

2. The testimony introduced is contradictory, equivocal, and most doubtful. It results in a preponderance against plaintiff's contention.

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It is not sufficient to move a jury. It wholly fails of the clear, precise, and indubitable character necessary to move a chancellor. Williamson v. Carpenter, supra. Plaintiff testifies that both quarter sections were, according to agreement with the vendor, to have been contracted and deeded in his name only, and that he believed that this had been done, until shortly before the commencement of this action, when he discovered that both ran to him and his father jointly. None the less the plaintiff admits that he knew that his father signed the contract, and with his wife (the mother) joined in execution of purchase-money mortgages; that his father swore in another lawsuit, in which he was a witness, that the father owned one quarter, and that his father's possession involved claim of title. So far as the deeds are concerned, he is contradicted by his vendor, his own witness; for, while the testimony of the latter is confused, uncertain, and inconsistent, it is still evidence of his understanding from father and son that he was to "deed the boy the quarter in section 28 and the old gentleman the quarter in section 27." The scrivener who drew the deeds (also called by plaintiff) explained to both father and son that it was impossible to draw one deed to one quarter to the father, another deed to the son for the other quarter, because the contract ran to both, and that, in order to make title to each quarter as they wished it, they would have to quitclaim to each other. He offered to draw such papers free of charge.

There are other contradictions and inconsistencies as to facts concerning possession and payment and other matters. Realizing the difficulties in his case, a part of which has been indicated, plaintiff's counsel ingeniously abandoned the attempt to reform the contract and deeds so as to make them conform to his largest claim, and finally asked for reformation as to the quarter in section 28, which he insists the testimony shows plaintiff owned exclusively. Such a contention is obviously inconsistent with the allegations of the petition and with the plaintiff's own evidence. It merely serves to emphasize the failure to show what was the true agreement to be reformed. Proof of its terms is as much wanting as evidence that there was in point of fact any mutual mistake.

3. Finally, the plaintiff, by his own conduct, has put himself beyond the proper exercise of equitable discretion on his behalf, irrespective of the rights or status of defendants. The ground of excuse

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for his ignorance of the true state of the contract and deed is that he was unable to read or write the English language, although he could sign his name. It does not appear that when his father signed the contract and the purchase-money mortgages he did not understand the significance of a signature at the usual place for a signature of parties, as distinguished from witnesses. The most casual observation of the contract could scarcely have failed to note the difference in penmanship, ink and place on line, between his name and that of his father's on the contract. The contract was in his possession from about June 16, 1896, and the deeds from about May 25, 1901, until November, 1903, before he discovered the mistake. There were many occasions on which it was his duty to have had the instrument read to him by some one in whom he had a right to place confidence. "The law * * * will not undertake the care of persons who will not, with the means at hand, take care of themselves." Commissioners v. Younger, 29 Cal. 172; 2 Kent, Com. 484; 1 Story, Eq. § 200a; Comstock v. Comstock, 76 Minn. 396, 79 N. W. 300; Wall v. Meilke, 89 Minn. 232, 237, 94 N. W. 688; Quimby v. Shearer, 56 Minn. 534, 539, 58 N. W. 155; Marcotte v. Hartman, 46 Minn. 202, 48 N. W. 767; Hawkins v. Hawkins, 50 Cal. 558, 560; Weller's Appeal, 103 Pa. St. 594, 599; McKinney v. Herrick, 66 Iowa, 414, 23 N. W. 767.

Many circumstances obtruded the knowledge of the so-called mistake upon plaintiff. But for years he succeeded, according to his own testimony, in eluding the intelligence which was pursuing him. This may have been vigilance on his part, but it was in the wrong direction to lead him through the portals of a court of equity. The immediate cause of his enlightenment is not disclosed. The defendants did not introduce evidence of their rights under the execution certificates. It does appear, however, that his knowledge of the mistake reached him at the time one of his counsel was with him at the county seat during the session of the district court, November 21, 1903. His counsel showed him the record. Then he understood. In the light of all the testimony he is clearly not entitled to the relief demanded, without regard to rights of defendants except the right to dismiss the case.

This view of the case renders it unnecessary to consider the other exceptions or assignments of error.

Order affirmed.

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BIBB BROOM CORN COMPANY v. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.[1]

February 24, 1905.

Nos. 14,132—(200).

Duty of Carrier.

It is the duty of a common carrier to whom goods are delivered for transportation to forward them promptly, and without unreasonable delay, to their destination.

Negligence of Carrier.

If he fails to do so, and negligently and carelessly delays the shipment, and the goods are overtaken in transit and damaged by an act of God, which would not have caused the damage had there been no delay, he is liable, even though the act of God could not reasonably have been anticipated. The negligence and unreasonable delay is such a proximate or concurring cause as renders a carrier liable.

Rule Applied.

This rule applies whether the goods in their nature are perishable or nonperishable.

Action in the municipal court of Minneapolis, to recover $500 for the loss of a carload of broom corn while in transit over the railway of defendant company. The defense was that the damage was caused by an act of God. The case was tried before Dickinson, J., and a jury, which rendered a verdict in favor of plaintiff for $412.20. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Belden, Hawley & Jamison, for appellant.

The negligent delay of defendant in forwarding plaintiff's goods, but for which such goods would not have been damaged, does not as a matter of law create any liability on the part of the defendant. Gilson v. Delaware (65 Vt. 213) 36 Am. St. Rep. 838, note; Norris v. Savannah (23 Fla. 182) 11 Am. St. Rep. 355, 362, note; Railroad Co. v. Reeves, 10 Wall. 176, 191; St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co., 139 U. S. 223, 237; Hoadley v. Northern,

[1] Reported in 102 N. W. 709.

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115 Mass. 304; McClary v. Sioux City, 3 Neb. 44; Daniels v. Ballentine, 23 Oh. St. 532; Dubuque v. City, 30 Iowa, 176; Lamont v. Nashville, 9 Heisk. 58; Clark v. Pacific, 39 Mo. 184; McVeagh v. Atchison, 3 N. Mex. 205; Reid v. Evansville, 10 Ind. App. 385; Davis v. Central Vermont, 66 Vt. 690; Philadelphia v. Anderson, 94 Pa. St. 351; and Baltimore v. Sulphur Spring, 96 Pa. St. 65.

Arthur W. Selover, for respondent.

BROWN, J.

The facts in this case are as follows: On or about May 12, 1903, plaintiff delivered to defendant at Stafford, Kansas, a carload of broom corn, to be transported to Minneapolis, this state. The route of transportation was by way of Kansas City, and defendant was to forward the car at that point, the terminus of its line, over the Chicago Great Western Road. The car reached the freightyards of defendant at Kansas City on May 23, but defendant wholly failed and neglected to send it forward or notify the Chicago Great Western Company of its arrival, though the evidence tends to show that immediately after the arrival of the car at Kansas City defendant sent a messenger to communicate the fact to the Great Western Company, and that it was to be forwarded over its line, but through carelessness the messenger notified the Missouri Pacific Company instead, and the Great Western was not informed of the matter at all. In consequence of the neglect of the messenger, the car remained in the yards of defendant until it was submerged by water in the great flood occurring during the last days of May and the first days of June at Kansas City, and the corn substantially destroyed. After the waters of the flood had receded, defendant, having first offered to forward the car to Minneapolis and plaintiff having refused to accept the corn in its damaged condition, caused the same to be sold, and tendered plaintiff the proceeds, less freight charges. Plaintiff brought this action to recover the value of the corn, alleging in its complaint that it was damaged and injured while in the possession of defendant, through its negligence and carelessness.

The delivery of the corn to defendant for transportation, and that it was damaged while in defendant's possession, are admitted in the answer, but it is alleged in defense that the damage was caused by an act

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of God; that an unusual and extraordinary rainfall occurred at Kansas City and vicinity at the time the car was in its yards, causing the river to overflow its banks and submerge defendant's yards, the occurrence and extent of which could not have been foreseen or anticipated.

The trial court instructed the jury in part that, if the corn was destroyed by an act of God, unaccompanied by the concurrent negligence of defendant, plaintiff could not recover; but, in effect, left to the jury to say whether the delay in forwarding the car was negligence, and whether such negligence concurred in causing the damage. The jury returned a verdict for plaintiff, and defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict or for a new trial.

The only assignments of error requiring consideration are those which challenge the charge of the trial court, in which the jury was instructed that, if the negligent delay of defendant in forwarding the car concurred in causing the injury or loss complained of, defendant was liable. It is contended with much earnestness and ability by defendant's counsel that, notwithstanding there might have been negligent delay in forwarding the car from Kansas City to Minneapolis, but for which the corn would not have been damaged, yet the damage complained of resulted proximately from the flood, an act of God, and that, as plaintiff failed to show that defendant was chargeable with neglect in not foreseeing or guarding against the danger, no recovery can be had.

The question presented, then, is whether a common carrier is liable to the owner of goods delivered to him for transportation, which are damaged or destroyed by an act of God while in his possession, in consequence of a negligent delay in forwarding them, whether the act of God could reasonably have been anticipated or not. The question is an important one, and the authorities are not in harmony. We have considered it with care in all its bearings, and reach the conclusion that the carrier is liable.

As a general rule, applicable to all cases of negligence, if damage is caused by the concurrent force of defendant's neglect and some other cause for which he is not responsible, including an act of God, he is nevertheless liable if his negligence is one of the proximate causes of the injury complained of, even though, under the particular circum-

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stances, he was not bound to anticipate the interference of the intervening force which concurred with his own.

In the application of this rule, however, the authorities are not agreed. It is held in some states, as applied to common carriers, that a negligent delay in forwarding property delivered to them for transportation, which is injured by an act of God, or other cause for which they are not responsible, and could not reasonably have been anticipated, does not render the carrier liable, although the property would not have been damaged had there been no delay. 1 Am. & Eng. Enc. (2d Ed.) 596. Courts holding to this rule place their decisions on the ground that the act of God in such cases is the proximate cause of the injury, and not the delay in transportation. Herring v. Chesapeake, 101 Va. 778, 45 S. E. 322. In other states the opposite doctrine is settled and adhered to. 1 Shearman & R. Neg. § 40.

The authorities are not at variance where the property damaged is perishable, or inherently susceptible to damage from climatic influences, as sudden changes in the weather. Changes in the weather are conditions which the carrier is bound to anticipate as likely to occur, and for injuries resulting to perishable goods from such causes the carrier is liable where his negligent delay in forwarding them contributes to cause the injury. Goods in this class are those likely to be damaged by freezing or from excessive heat.

The authorities are at variance, in so far as negligent delay is concerned, only in cases involving property not perishable. The property in the case at bar was of that character, and would not have been damaged but for the flood that submerged the car while in the yards at Kansas City; neither would it have been damaged had defendant forwarded the car to Minneapolis promptly, and without unreasonable delay, as it was required by law to do. So the question is, was the negligent delay of defendant in forwarding the car one of the proximate causes of the damage to the corn, or did such delay concur with the flood in fact causing the damage? It may be conceded, for the purposes of this case, that the flood was an act of God; that it was unprecedented, and beyond the reasonable anticipation of the most prudent residents of the vicinity where it occurred; and, unless we are to hold that the negligent delay did not render defendant liable, the case must be reversed.

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One of the first cases reported in the books, so far as our research has extended, wherein the carrier is held liable for negligent delay in transporting goods, not perishable, which were injured in transit by an overpowering cause not reasonably to have been anticipated, is Michaels v. New York, 30 N. Y. 564. In that case there was a delay of several days in forwarding certain dry goods delivered to the defendant for transportation, which were damaged in transit by an act of God—a flood similar to the one in the case at bar. In disposing of the case and the contention of the railway company that it was exempt from liability for the reason that the injury complained of was the result of an act of God, the court said: When a carrier is intrusted with goods for transportation, and they are injured or lost in transit, the law holds him responsible for the injury. He is only exempted by showing that the injury was caused by an act of God or the public enemy; and to avail himself of such exemption he must show that he was himself free from fault at the time. His act or negligence must not concur or contribute to the injury. If he departs from the line of his duty, and violates his contract, and while thus in fault, and in consequence of that fault, the goods are injured by an act of God, which would not otherwise have caused the injury, he is not protected.

That case has been consistently followed and adhered to in New York, and is now the settled law of that state. In Read v. Spaulding, 30 N. Y. 630, it was held that, if a common carrier unreasonably delays goods received by him for transportation, and they are injured by an act of God in consequence of such delay, he must show, to exempt himself from liability, that the delay did not contribute to or concur in the injury. In Condict v. Grand Trunk, 54 N. Y. 500, it was said that it is the duty of a common carrier to forward goods delivered to him for transportation promptly, and within a reasonable time, and, if a loss occurs in which his negligence in part concurs, he is liable. See also Dunson v. New York, 3 Lans. (N. Y.) 265.

This doctrine has been followed and applied in other states. In Wolf v. American, 43 Mo. 421, the court laid down the general rule in such cases in the following language: "The act of God which excuses a carrier must not only be the proximate cause of the loss, but the better opinion is that it must be the sole cause. And when the loss

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is caused by the act of God, if the negligence of the carrier mingles with it as an active and co-operative cause, he is still responsible."

In Wald v. Pittsburg, 162 Ill. 545, 44 N. E. 888, it appeared that plaintiff had purchased of defendant a ticket entitling him to passage from Chicago to New York upon one of its trains known as the "Limited Express." He was also entitled, as a matter of law, to have his baggage, which was checked at the time he procured his ticket, forwarded by the same train. The baggage was, however, by the negligence of the baggageman, forwarded from some point on the line by the day express, a train following the "Limited Express" a number of hours later. Plaintiff reached his destination in safety, but the day express which carried his baggage was overtaken by a flood at Johnstown, Pennsylvania—an act of God—and the baggage destroyed. The court held the defendant liable, saying in the opinion that the unnecessary delay of a carrier which subjects goods in his possession to loss by an act of God, which they would not otherwise have met with, is in itself such negligence as will render him liable.

In Louisville v. Gidley, 119 Ala. 523, 24 South. 753, it appeared that defendant delivered to plaintiff, a common carrier, at Gadsden, Alabama, goods to be transported to Philadelphia. The carrier unnecessarily delayed forwarding them for some days, and they were in the meantime destroyed by a fire, for which plaintiff was in no way responsible, and for which it could not, under its contract, have been made liable to the owner of the goods. The court held that the unnecessary delay in shipment was the proximate cause of the loss, and that the carrier was liable.

This rule of liability is followed in Kentucky. Cassilay v. C. P. Young & Co., 4 B. Mon. 265; Hernsheim v. Newport (Ky.) 35 S. W. 1115. Also in Maryland, Baltimore v. Keedy, 75 Md. 320, 23 Atl. 643. The foregoing cases all involve property not perishable, and the negligent delay was held either the proximate cause of the loss, or that it concurred with the act of God in causing the damage and rendered the carrier liable. Other cases, more or less in point, may be found collected in Gilson v. Delaware (65 Vt. 213) 36 Am. St. Rep. 839. See also Deming v. Grand Trunk, 48 N. H. 455; Michigan v. Curtis, 80 Ill. 324; Campbell v. Morse, Harp. (S. C.) 468; Meyer v. Vicksburg, 41 La. An. 639, 6 South. 218; Missouri v. McFadden, 89 Tex. 138, 33

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S. W. 853; Pruitt v. Hannibal, 62 Mo. 527. And the rule was, in effect, laid down, though the precise question here under consideration was not there involved, in Jones v. Minneapolis & St. Louis R. Co., 91 Minn. 229, 97 N. W. 893.

We have examined the authorities holding the opposite of this doctrine, and, while the courts adhering to the same are of eminent standing, we have no difficulty in adopting the view of the cases above cited. The rule that permits a carrier to excuse his negligence by an act of God overtaking him while thus in fault seems to us unsound. It is based on too strict an application of the rule of proximate cause. It is the duty of a common carrier to whom goods are delivered for transportation promptly and without unreasonable delay to forward them to their destination, and such was defendant's duty in the case at bar. This it failed to do, and its negligence in this respect is not seriously controverted. The car arrived at its yards in Kansas City on May 23, and was permitted to remain there without proper effort to forward it until it was overtaken by the flood. It could have been moved from defendant's yards on any day after its arrival prior to May 29, and, had this been done, the corn would not have been damaged. If defendant had acted as required by the terms of its contract, and as enjoined by law, the car would have been forwarded, and would have arrived at its destination prior to the flood. That defendant's neglect concurred and mingled with the act of God seems the only reasonable conclusion the facts will warrant, and we feel safe in applying the general rule that an act of God is not in such cases a defense.

Every reason in equity and justice relieves a carrier from the performance of his contract and from liability for injuries to property in his custody for transportation, resulting exclusively from an act of God, or other inevitable accident or cause over which he has no control, and could not reasonably anticipate or guard against. But reasons of that nature lose their force and persuasive powers when applied to a carrier who violates his contract, and by his unreasonable delay and procrastination is overtaken by an overpowering cause, even though of a nature not reasonably to be anticipated or foreseen. If, but for his negligence, the loss would not have occurred, no sound reason will excuse him, and he should not be relieved by an application of the

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abstract principles of the law of proximate cause. No wrongdoer should be allowed to apportion or qualify his own wrong; and, if a loss occurs while his wrongful act is in operation and force, and which is attributable thereto, he should be held liable. Davis v. Garrett, 6 Bing. 716.

Our conclusions are that the trial court correctly instructed the jury, that the record presents no reversible errors, and the order appealed from is affirmed.

Order affirmed.

EDWARD WICKENBURG v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.[1]

February 24, 1905.

Nos. 14,151—(186).

Action for Personal Injury.

To entitle one to maintain an action for injuries to his person by reason of the negligence of another, it must appear that some obligation or duty existed on the part of the person causing the injury toward the person injured, and that the same was left undischarged or unfulfilled.

Injury to Trespasser.

The tracks of defendant and the Chicago, St. Paul, Minneapolis & Omaha Railway Company intersect at Turtle Lake, in the state of Wisconsin. The statutes of that state expressly require all trains operated on railroads therein, before passing over another railroad track at a point of intersection, to come to a stop at a distance of four hundred feet therefrom. Defendant, in violation of the statute, failed to stop one of its trains on the occasion complained of in this action, and negligently collided at the crossing with a train on the Omaha Road, seriously injuring plaintiff. Plaintiff is a boy about twelve years of age, and got upon the Omaha train when it stopped before passing the crossing for the purpose of riding from there to the station. He was riding upon or clinging to the steps of one of the cars of that train, in violation of a statute of the state of Wisconsin. He was not a passenger, nor did he intend to become such, and his presence on the train was unknown to the Omaha Company or any

[1] Reported in 102 N. W. 713

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of its employees. It is *held* that the obligation of defendant to exercise reasonable care to avoid a collision with the Omaha train, or to injure persons lawfully thereon, did not extend to plaintiff, and he cannot recover.

Action in the district court for Washington county by plaintiff, by his guardian ad litem, to recover $10,000 for personal injuries. The case was tried before Williston, J., and a jury, which rendered a verdict in favor of plaintiff for $2,000. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed and judgment ordered for defendant.

Alfred H. Bright, for appellant.

Thomas Canty and *Bond & Armstrong*, for respondent.

BROWN, J.

Action to recover for personal injuries growing out of a collision at Turtle Lake, Wisconsin, between a passenger train on the Chicago, St. Paul, Minneapolis & Omaha Railroad and defendant at a crossing of the two roads. Plaintiff had a verdict in the court below, and defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict, or for a new trial.

The facts are as follows: The tracks of the two railroads intersect at Turtle Lake, in Wisconsin. On both of the roads, four hundred feet from the point of intersection, each company placed what is termed in the record a "stop board," at which, by the statutes of the state of Wisconsin, all trains are required to come to a stop before passing over the crossing. On the occasion in question the Omaha train complied with the law—at least, the evidence is sufficient to justify the jury in so finding—but the train operated by defendant, according to the evidence, neglected to do so, in consequence of which its train ran into the Omaha train at the crossing, seriously injuring plaintiff. Plaintiff is a boy between twelve and thirteen years of age, and on the day of the collision got upon the Omaha train when it stopped at the "stop board" for the purpose of riding from there to the station, which was some distance beyond the crossing. He was upon the forward steps of a combination car attached to the Omaha train, between that and the mail car. He was not a passenger, nor did he intend to become such, nor an employee of the Omaha Company, and, so far as the record discloses,

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had no right upon the train, and his presence was unknown to the employees operating the same. In addition to the fact that he was not upon the train as a passenger, or with the consent or knowledge of the Omaha Company, he was there in violation of section 4397b of the Revised Statutes of the state of Wisconsin. That statute prohibits any person under the age of seventeen years from getting upon, or attempting to get upon, or clinging to, jumping or stepping from, any railroad car or train while the same is in motion. Plaintiff, being upon the steps of the car, with his hands holding onto the hand rails, was, within the meaning of the statute, clinging to the car while the same was in motion. At the time of the collision he was either thrown from the car, or, in an attempt to save himself from injury, jumped therefrom, and received the injuries complained of. The facts are undisputed, and substantially as stated. The case presents the bare question whether defendant is liable to him for the injuries thus sustained.

It is elementary that, in order to maintain an action for an injury to the person by reason of the alleged negligence of another, it must appear that some obligation or duty existed on the part of the person causing the injury toward the person injured, and that the same was left undischarged or unfulfilled. The question in the case at bar is, what duty did the defendant owe plaintiff on the occasion in question? We have repeatedly held, in harmony with the authorities generally, that a railway company owes no duty to a trespasser upon its trains until it discovers him in a position of peril, and is not liable to him for injuries sustained through its failure to exercise reasonable and ordinary care; that liability exists, as to such persons, only for a wilful and wanton injury, and that rule applies to the case at bar.

It was the duty of defendant, in respect to operating its trains over the crossing of the Omaha Road, to comply with the statutes of Wisconsin, and bring its train to a stop before passing the crossing; and the failure to do so would constitute actionable negligence as to all persons to whom it owed the duty to so act. And, too, the elementary rule of law that one should so use his own as not unnecessarily to injure another would require the exercise of the same degree of care that is imposed by the statute. The rights, duties, and obligations respecting the operation of trains at the crossing, and liability for negligent acts of commission or omission, as between the two companies,

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are reciprocal, and extend by relation to all persons lawfully upon the trains of each. The care required by the statute and the rule just stated was not exercised by defendant on the occasion in question, and the important question for consideration is whether a person occupying the position plaintiff did—a trespasser upon the train with which defendant negligently came into collision—may complain of the failure to do so. Plaintiff was not only a trespasser upon the Omaha train, but was clinging to one of the cars attached thereto while the same was in motion, in violation of express law. He was a wrongdoer, and, if his injuries had been caused by the negligence of that company, instead of the negligence of defendant, he would unquestionably have had no redress. It seems to us that it would be doubtful logic that would grant him relief against defendant. While he was not a trespasser as to defendant when he got upon the Omaha train, he was such at the point of intersection of the two roads, for the rights of defendant at the crossing were equal to those of the Omaha Company.

The rule applicable and which controls the decision in this case is correctly stated in Akers v. Chicago, St. P., M. & O. Ry. Co., 58 Minn. 540, 60 N. W. 669. It was there said: "Actionable negligence is the failure to discharge a legal duty to the person injured. If there is no duty, there is no negligence. Even if a defendant owes a duty to some one else, but does not owe it to the person injured, no action will lie." Defendant was charged in that case with failing and neglecting to block a frog in one of the yard tracks over which plaintiff, a trespasser, was walking, in consequence of which failure his foot was caught in the frog, and he was injured. The court held that although defendant was under obligations to block the frog, as to its employees and others rightfully upon its premises, it did not owe that duty to plaintiff. Unless we are prepared to ingraft an exception upon the general rule that a trespasser is not entitled to recover for injuries, resulting from the failure to exercise ordinary care on the part of the person inflicting the injury, plaintiff cannot recover. This we are not prepared to do.

The fact that the accident complained of was caused by the failure of defendant to observe a statutory requirement—to stop its train before passing the crossing—is of no special significance. The mere fact that defendant violated the statute does not enlarge the rule of responsibility, and render it liable to one to whom it would not be liable if the statute did not exist. Illinois v. O'Connor, 189 Ill. 559, 59 N. E. 1098.

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The main contention of plaintiff's counsel is that defendant is in no position to be heard to say that plaintiff was a trespasser upon the Omaha train; that liability for its negligence extends to him, as well as to all other persons upon the train at that time. This contention goes to the substance of the question, and cannot be sustained without denying to defendant the right to be heard in its defense, and to show that it was under no obligation to plaintiff; and this in the face of the fact that plaintiff's right of recovery is exclusively predicated upon defendant's failure to perform and fulfil an alleged duty it owed him. If a recovery may be had by a person occupying the position plaintiff did—riding upon the steps of the Omaha train without the knowledge or consent of the company—then the individual known to the world as the "tramp," riding upon the brake beams under the car, would be equally entitled to recover; and the courts would hesitate long, in an extreme case of that kind, to declare that he was entitled to recognition.

We need not indulge in a discussion of the question whether persons upon a train with which another negligently collides, who are there with the knowledge and consent of the company, riding without payment of fare with the consent of the employees or upon forged passes, or other unlawful or fraudulent means, would be entitled to recover, There is a marked distinction between persons riding on a train with the knowledge and consent of its employees, and persons situated as plaintiff was—upon the steps of one of the cars attached to the train, without right, in violation of express law, and without the knowledge or consent of the company.

In view of the elementary principles of law with which we are confronted, we are constrained to hold that plaintiff is not entitled to recover. He was a trespasser upon the Omaha train—there without the knowledge or consent of the Omaha Company—and defendant owed him no duty and was under no obligation to exercise reasonable and ordinary care for his protection. While the rule extends to all persons lawfully upon the train with which defendant's train collided, it did not extend to plaintiff.

The facts in the case are not in dispute. There is no probability that a better case can be made on a second trial, and the order appealed from will therefore be reversed, and the cause remanded, with directions to the court below to enter judgment for defendant.

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HAMMING STRAMBACK v. FIDELITY MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA.[1]

February 24, 1905.

Nos. 14,194—(223).

Life Insurance Policy—When Effective.

A life insurance policy provided that it was made in consideration of the payment in advance of $55.02 on delivery and thereafter upon September 8 and March 8 of each and every year until the premium for fifteen full years should have been paid. The policy further provided, "But in any event this policy shall continue in force only for the period actually paid," and that it should not be in operation until actual payment of the first premium and delivery of the policy during the lifetime and good health of the insured. The forfeiture clause read, "If any premium be not paid when due, this policy shall be void until duly reinstated during the lifetime and good health of the insured."

An application signed by the insured was dated August 25, 1902. The policy issued was dated September 8. The first premium was paid concurrently with delivery of the policy to the insured, September 24, 1902. The second semiannual premium was paid, but the payment due September 8, 1903, was not made, and the insured died September 11, 1903.

Held, the policy took effect and the insurance term paid for began at the date of payment and delivery, September 24, 1902, and, upon payment of the second semiannual premium, the period of insurance paid for expired September 24, 1903. The forfeiture for nonpayment of the third semiannual premium did not cover the period of insurance then paid for, but had reference to the future contract of insurance covered by the premium defaulted.

Action in the district court for St. Louis county to recover from defendant $3,000 on a policy of insurance issued upon the life of Charley Stramback, plaintiff's father. Defendant denied liability under the policy, alleging that by its terms it had been forfeited by nonpayment of the stipulated premium when due. The case was tried before Dibell, J., who found in favor of defendant. From a judgment entered pursuant to the findings, plaintiff appealed. Reversed and judgment ordered for plaintiff.

[1] Reported in 102 N. W. 731.

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Washburn, Bailey & Mitchell, for appellant.

By the terms of the policy it was not to become operative or binding until payment of the initial premium and delivery of the policy to the insured. Such a provision is valid. Kohen v. Mutual Reserve Fund Life Assn., 28 Fed. 705; Misselhorn v. Mutual Reserve Fund Life Assn., 30 Fed. 545; Weinfeld v. Mutual Reserve Fund Life Assn., 53 Fed. 208; Giddings v. Insurance Co., 102 U. S. 108; Newcomb v. Provident, 5 Colo. App. 140; Heiman v. Phœnix Mut. Ins. Co., 17 Minn. 127 (153). The initial premium was paid and policy delivered September 24, 1902. By the terms of the policy the insured was entitled to at least one year's protection for the payment of the one year's premiums which were paid, and the policy was therefore in full force on September 11, 1903, the date of Stramback's death. McMaster v. New York Life Ins. Co., 183 U. S. 25.

It is a universal rule that when policies of insurance contain ambiguous, contradictory, conflicting or inconsistent provisions, effect will be given to the provisions most favorable to the insured and that construction will be adopted which is most favorable to the insured and which avoids forfeiture. McMaster v. New York Life Ins. Co., supra; National Bank v. Insurance Co., 95 U. S. 673; Grace v. American Central Ins. Co., 109 U. S. 278.

A. L. Agatin, for respondent.

So far as this case is concerned, the only thing decided by the McMaster case, relied on by appellant, 183 U. S. 25, was this: That the policies contained inconsistent provisions, one showing the date to be December 18, 1893, and payment of annual premiums in advance, and the other requiring next payment December 12, or six days before the time for which the first premium was paid. The conclusion arrived at in that case was upon the construction of the language of the policy, containing inconsistent provisions.

The policy as issued and accepted must, in a court of law, be taken as expressing the final agreement of the parties and all the rights of respective parties must be determined by reference to said policy as the sole expositor of the contract of the parties. Insurance Co. v. Lyman, 82 U. S. 664; Insurance Co. v. Mowry, 96 U. S. 544; Thompson v. Insurance Co., 104 U. S. 252; Mobile v. Pruett, 74 Ala. 487; Mc-

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Laughlin v. Equitable, 38 Neb. 725; Smith v. National, 103 Pa. St. 177. Where a person receives an insurance policy it is his duty to examine it, and if he neglects to do so, taking it for granted that he has received what he applied for, he is guilty of inexcusable negligence. In law his conduct amounts to an acceptance of the policy regardless of whether it corresponds to the policy applied for or not. Bostwick v. Mutual, 116 Wis. 392; Wilcox v. Continental, 85 Wis. 193; McMaster v. New York Life Ins. Co., 87 Fed. 63; McMaster v. New York Life Ins. Co., 90 Fed. 40.

The policy was forfeited by failure to pay the premium of September 8, 1903. New York Life Ins. Co. v. Statham, 93 U. S. 24; 2 Joyce, Ins. § 1350; 2 May, Ins. §§ 352, 352a.

A contract of insurance such as the one embodied in the policy here, is not a contract for a single year or for any determinate period but for life, subject to forfeiture for nonpayment of premiums. Thompson v. Insurance Co., supra; New York Life Ins. Co. v. Statham, supra; McMaster v. New York Life Ins. Co., 183 U. S. 25; Bryan v. National, 21 R. I. 149. The provision in the policy in question calling for next premium on September 8, 1903, being a valid one, the failure to make such payment, according to all the authorities, had the effect to forfeit the policy, unless the call for such premiums is inconsistent with the provision that the policy shall not take effect until actually delivered. For cases exactly in point on this proposition, we cite: Methvin v. Fidelity, 129 Cal. 251; McConnell v. Provident Savings Life Assur. Soc., 92 Fed. 769; Bryan v. National Life Ins. Co., supra; Tibbits v. Mutual, 159 Ind. 671.

LEWIS, J.

August 25, 1902, Charley Stramback made application to defendant insurance company for $3,000 insurance upon his life; his children to be the beneficiaries. The application stated that the policy to be issued should not become binding on the company until the first payment due should have been actually received by it, or its authorized agent, during the lifetime and good health of the insured. The policy contained this provision:

> This contract is made in consideration of the written application of the above named insured, which is made a part hereof,

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> a copy of which is hereto attached, and the payment in advance to said company of $55.02 on the delivery of this policy, and thereafter to the company at its head office in the city of Philadelphia, upon the eighth day of the months of September and March in every year until the premiums for fifteen full years shall have been duly paid to the said company.

Among the general provisions in the policy is one to the effect that the application forms the sole basis of the contract, which shall not be operative or binding until actual payment of the initial premium and delivery of the policy during the lifetime and good health of the insured. And also:

> If any premium be not paid when due, this policy shall be void until duly reinstated during the lifetime and good health of the insured.

The policy was forwarded from Philadelphia and delivered to the insured September 24, 1902, at which time the first premium was paid. The second semiannual payment, due March 8, 1903, was paid, but the next premium, due September 8, 1903, was not paid, and three days thereafter, September 11, the insured died. The trial court held that the policy became forfeited September 8, 1903, for failure to pay the premium due on that date.

The primary question to be determined is, from what date did the insurance commence to run? Was it from date of payment of the first premium and delivery of the policy to the insured, September 24, or was it from date of issuance of the policy, September 8, or from date of the application, August 25? According to the findings, the delivery of the policy and payment of the first premium were concurrent acts. It is a curious fact that the application and the policy are silent as to the date from which the policy shall commence to run. Defendant takes the position that it is necessarily implied by the language of the documents, by the usual course of insurance business, and by the conduct of the parties, that the insurance commenced to run from the date of the policy, but did not become effective or operative until payment of the first premium and delivery of the policy.

Whatever may have been the purpose of leaving unstated the specific date at which the contract commenced to run, we are of the opin-

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ion that the inference drawn by defendant from the facts of this case is unwarranted. The rule of construction to be applied here is that the instrument shall be construed strictly against the insurer. It would have been a very easy matter to insert a clause to the effect that the policy should take effect from its date, if such was the intention of the insurer, and, in the absence of any such provision or agreement on the part of the insured, the following provision should control:

> The application, copy of which is given on third page, forms the sole basis of this contract which shall not be operative or binding until the actual payment of the initial premium and delivery of the policy during the lifetime and good health of the insured.

This language, taken by itself, means not only that the contract became effective upon the date of payment and delivery of the policy, but also that the policy commenced to run from such date.

Defendant refers to the following clause in the policy in support of its theory that it was contemplated by the parties that the period of insurance paid for was to begin September 8, and not at the time of payment and delivery:

> This contract is made in consideration of the written application * * * and the payment in advance to said company of $55.02 on the delivery of this policy, and thereafter to the company at its head office in the city of Philadelphia upon the eighth day of the months of September and March in every year until the premiums for fifteen full years shall have been duly paid to the said company.

It may be admitted that, if this clause were the only provision relative to the subject, it might be susceptible of such meaning, but this language must be read in connection with other provisions, viz., the following:

> The premiums hereon may be paid annually, semiannually or quarterly, in advance, in accordance with the company's table of rates applicable hereto, but in any event this policy shall continue in force only for the period actually paid.

In our judgment, the significant thing is the payment of the premium in advance, and not the date of its payment; and the insured, when

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furnished with the policy, was entitled to assume that by the payment of the semiannual premium he had paid for half a year's insurance, and he was advised that all subsequent premiums were required to be paid on the eighth of March and September, but what was there to call his attention to the fact that the period of insurance was to date from the day of such payments? If such is the custom and practice of insurance companies, and the insured had knowledge of it, the record is silent upon that point. The argument is advanced that it would tend to much confusion if insurance policies were required to run from the date of their delivery, instead of the date of their issuance; but, on the other hand, it may be said that the insured could be deprived of insurance already paid for, were the company permitted to fix conditionally the inception of the term of insurance at the date of the policy, dependent upon subsequent payment and delivery. This period between the dating of the policy and its delivery, under such construction, would inure to the benefit of the company, for it is conceded that if the insured in this case had died between the issuance of the policy, September 8, and the payment of the premium and delivery of the policy, September 24, the company would not have been liable. Our conclusion on this point is that it was contemplated by the parties, as gathered from their conduct and the documents, not only that the policy became effective September 24, but also that the insurance paid for by the initial premium had its inception September 24.

Having determined that the insurance period paid for began September 24, 1902, it follows that it would have expired March 24, 1903, had the premium not been paid, but it was paid, and therefore the policy remained in force until forfeiture by nonpayment of the next semiannual instalment. The insurance period covered by the first and second premiums expired September 24, 1903, and, the insured having died September 11, the policy was in force, unless forfeited by a failure to make the payment due September 8. Whether it was forfeited depends upon the meaning of the language chosen to express the forfeiture, which reads:

> If any premium be not paid when due, this policy shall be void until duly reinstated during the lifetime and good health of the insured.

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In our judgment, this language was used with reference to the continuation of the policy after the period already paid for. Forfeitures are not favored in the law, and any other conclusion would work a hardship upon the insured, and should not be upheld unless required by the terms of the contract.

It was proper for the insurer to provide that the premium should be paid in advance of the commencement of the period of insurance covered by such payment. As stated in New York Life Ins. Co. v. Statham, 92 U. S. 24, contracts of this character are not contracts of assurance for a single year, with the privilege of renewal from year to year by paying the annual premium; but they constitute entire contracts of assurance for life, subject to discontinuance or forfeiture for nonpayment of any of the stipulated premiums. This theory is reiterated in McMaster v. New York Life Ins. Co., 183 U. S. 25, 22 Sup. Ct. 10. Looking at the contract, therefore, as being one of insurance for life, the most reasonable view is that failure to pay a premium due on a certain date was intended to strike at the contract for the future, and not that part of the contract already executed.

This point, we think, is covered by the reasoning in McMaster v. New York Life Ins. Co., where application was made and payment fixed on December 12, and the policy was issued and dated the 18th, and delivered December 26. The insured died thirteen months after the date of the policy, or the last day of grace; and one of the questions before the court was whether the period of insurance had its inception at the time fixed for payment, December 12, or at the date of the policy, December 18. In this respect the court said: "Notwithstanding the premiums in this instance were not actually paid and received, and the policies delivered, until December 26, it may be conceded that, and in accordance with the practice in such matters, the contracts of insurance commenced to run from December 18, rather than from December 26. They were certainly not in force on December 12." It will be observed that the court conceded the insured period ran from the date of the policy, rather than from the date of its delivery; but whether it did, or not, was not decided, because the question before the court was whether or not the policy was forfeited upon failure to make the payment on December 12. "We are dealing purely with the question of forfeiture, and the rule is that if policies of insurance contain incon-

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sistent provisions, or are so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain, rather than forfeit, the contract." And in discussing the effect of the forfeiture clause, it was stated: "To hold the insurance forfeitable for nonpayment of another premium within the year for which payment had already been fully made would be to contradict the legal effect, under the applications and policies of the first annual payment. Clearly such a construction is uncalled for, if the words 'the twelfth day of December in every year thereafter' could be assumed to mean in every year after the year for which the premiums had been paid." The court concludes: "In our opinion, the payment of the first year's premiums made the policies nonforfeitable for the period of thirteen months, and inasmuch as the death of McMaster took place within that period, the alleged forfeiture furnished no defense to the action."

We have examined Methvin v. Fidelity, 129 Cal. 251, 61 Pac. 1112, Tibbits v. Mutual, 159 Ind. 671, 65 N. E. 1033, and Bryan v. National, 21 R. I. 149, 42 Atl. 513, and find the facts therein to be somewhat different from those involved in this action; but, so far as the legal principles announced are in conflict with our views herein expressed, we are unable to follow them.

Judgment reversed, and judgment ordered for plaintiff.

BROWN, J. (dissenting).

I am unable to concur with my brethren in this case. The intention of the parties, as expressed by their written contract, should prevail, though the result be to deprive plaintiff of his right of recovery. Fairly construed, it seems clear that the parties intended the policy to become operative and in force as of its date, though the first premium was not paid for sixteen days subsequent to that date. So construed, it had expired at the date of the insured's death. The confusion likely to result from the decision may well be imagined. Thousands of life insurance policies heretofore issued will become wholly indefinite and uncertain as to the time when they will lapse for nonpayment of premiums, and give rise to controversies as to the date of actual delivery —a condition, if the contract in this case is a fair guide, the parties intended to guard against.

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FREDERICK L. GILBERT and Another v. DANIEL D. McDONALD and Another.[1]

February 24, 1905.

Nos. 14,197—(213).

Homestead Filing.

The assignee of a soldier's additional homestead certificate, upon filing an application for a specific tract of land at the proper government land office, acquires an equitable title therein, which ripens into a legal title, relating back to the date of application, upon issuance of the government patent.

Conveyance of Interest.

Such equitable interest may be conveyed by quitclaim deed, and when the patent issues the legal title will inure to the benefit of the grantee.

Action for Trespass.

After patent issues, such grantee may maintain an action for damages for trespass upon the land committed after the date of application and before confirmation thereof.

Action in the district court for St. Louis county to recover treble damages amounting to $633.60 for trespass in cutting and removing timber from plaintiffs' land. The case was tried before Dibell, J., and a jury, which rendered a verdict in favor of plaintiffs for $150. From a judgment entered pursuant to the verdict, defendants appealed. Affirmed.

R. R. Briggs, for appellants.

Davis, Hollister & Wilson, for respondents.

LEWIS, J.

October 26, 1901, Samuel V. Gilbert filed application in the land office at Duluth, as assignee of a soldier's additional homestead certificate to the northwest quarter of the southwest quarter of section 9, town 62 north, of range 1, Cook county, Minnesota. The following November 20 he executed a quitclaim deed of the premises to plaintiffs. Between December 1, 1902, and March 7, 1903, defendants committed a trespass upon the land by cutting and carrying away timber there-

[1] Reported in 102 N. W. 712.

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from, which, according to the verdict rendered, was of the value of $150. March 16, 1903, the application was allowed by the General Land Office at Washington, and March 24, 1903, the necessary fees and disbursements were paid at the land office in Duluth, and the usual receiver's certificate issued. In April, 1903, Gilbert died. Patent issued June 1, 1903. This action was commenced June 29, 1903, for the purpose of recovering damages for the trespass. Defendants were total strangers to the title, and defended wholly upon the ground that at the time of the trespass plaintiffs had no title, the same being in the United States.

Plaintiffs cannot maintain this action unless upon the theory that at the time of the execution of the quitclaim deed Gilbert possessed an inchoate or equitable title, which was subject to be conveyed by such a deed, and upon the subsequent issuance of the patent the legal title related back to the application, October 26, 1901, and inured to the benefit of his grantees. It was held in Hastay v. Bonness, 84 Minn. 120, 86 N. W. 896, that, where an application for the entry of lands was legally and properly made under assignment of a soldier's additional homestead right, the right to possession of the land inured to the person making such entry as against a trespasser; that, while the applicant did not acquire full title to the land through her application, yet it entitled her to an inchoate interest therein, with the right of possession as against trespassers, and when the patent issued it related back to the date of the application.

The doctrine of relation and the effect of the receiver's certificate as evidence under section 5754, G. S. 1894, is referred to in the case of Winona & St. Peter R. Co. v. Randall, 29 Minn. 283, 13 N. W. 127, where it was held that a pre-emption certificate issued by the land office was prima facie evidence of title, not only at the time of the entry, but related back to the time of settlement upon the land. Under the authorities referred to, we consider the question settled in this state that when patent issues it furnishes evidence of title in the patentee from the very inception of the proceedings to acquire title.

The next question is: Was the interest which Gilbert acquired under his application of such character that it could be conveyed by quitclaim deed, and did the patent, when issued, inure to the benefit of the grantees? The Revised Statutes of the United States of 1878, § 2448 [2 U.

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S. Comp. St. 1901, 1512], provide that when a patent issues to a person deceased at its date title shall inure to and vest in the heirs, devisees, and assignees of such person, the same as if it had been issued to him during life. Consequently the fact that Gilbert died before patent issued has no bearing on the case. If filing a soldier's additional certificate and making application for the land vested an equitable title in Gilbert, such interest could be conveyed by quitclaim deed of the premises, and no other interest was intended to be conveyed except such equitable interest. No after-acquired title was conferred by the patent, and hence a quitclaim was as effective as a warranty deed could have been.

Whether his interest was of an equitable nature, or, as it has been described, an inchoate title, may be determined, we think, from the nature of the certificate. In most of the cases passing upon this question the receiver's receipt or certificate of entry had issued from the land office at the time of the conveyance by the entryman. Landes v. Brant, 10 How. 348; Gibson v. Chouteau, 13 How. 92; Kingman v. Holthaus (C. C.) 59 Fed. 305. The case of French v. Spencer, 21 How. 228, is very similar to this one. The government had authorized the issuance of land warrants to Canadian volunteers in the war of 1812, and the soldier named in a certain warrant located a tract of land, and a few days thereafter conveyed it; it was held that the deed of conveyance was sufficient to pass the interest of the grantor, and that a patent subsequently issued to the original beneficiary inured to the benefit of the purchaser, and related back to the date of the entry, and that the heir of the grantor was estopped from setting up a legal title under the patent.

Under the provisions of section 2306, Rev. St. U. S. [2 U. S. Comp. St. 1901, 1415], every soldier and sailor who had theretofore entered a homestead for less than one hundred sixty acres was entitled to enter so much land as, when added to the quantity previously entered, should not exceed one hundred sixty acres. When the proper party secures a certificate from the government showing that he is entitled to the additional land, he is not required to comply with the provisions of section 2304 [2 U. S. Comp. St. 1901, 1413], viz., to settle upon the land and cultivate the same for the requisite number of years before making final proof. The certificate itself furnishes the evidence to authorize the

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holder to select the lands desired and to make the application by filing the same in the proper land office. This statute was amended in 1894 by providing that such certificates might be sold and assigned, and the purchasers and assignees were authorized to make entries thereunder, patent to be issued in the name of the assignee. The effect of these provisions was that upon issuing such a certificate the government bound itself to approve of the entry when made, and to issue a patent thereon.

It seems to us that a selection of land and a filing of the application under a soldier's additional certificate, is just as much the inception of an interest in the land as is the issuance of a land-office certificate in the case of a pre-emptor or homesteader. Again, the statute itself seems to recognize that such an application vests an equitable interest in the applicant, for the reason that the amendment describes the application as an entry, and Congress did not see fit to restrict the right to alienate the interest between the time of entry and the issuance of a patent.

Upon this view of the title theory, Gilbert was possessed of an interest that could be conveyed by quitclaim deed. The case of Olson v. Minnesota & N. W. R. Co., 89 Minn. 280, 94 N. W. 871, supports these views, and is not in conflict, for, treating this action as one of trespass quare clausum, the legal title was vested in plaintiff at the time of the commencement of the action. It is not necessary to decide what the rights of the parties were prior to the issuance of the patent or the receiver's receipt. It may be that during such period the United States government alone could have prosecuted defendants for the trespass. Such being our conclusion, the documentary evidence was properly received.

Judgment affirmed.

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IDA C. RUPERT v. SUPREME COURT UNITED ORDER OF FORESTERS.[1]

February 24, 1905.

Nos. 14,198—(167).

Life Insurance—Application.

Where the answers to questions in an application for insurance and in statements of medical history are warranties, there can be no recovery on the policy if these answers are made by the insurer to affirmatively appear to be false.

Insurance Contract.

Parties to an insurance contract may by apt words make a fact material which would otherwise be immaterial, or make immaterial a fact which would otherwise be material.

Ambiguous Terms.

Complicated and ambiguous conditions and qualifications of such contract may involve the construction of the terms actually employed, so as to effectuate their purpose to protect both the insurer and the insured from fraud.

Meaning of Words Used.

The words used therein, having a narrower meaning appropriate to the purpose, will not be given their broadest import, having no reasonable reference to good faith or hazard, and leading to folly and demanding an impossibility.

Questions in Application.

When the questions propounded to an applicant are in such terms as to include trivial ailments and injuries unconnected with any specific disease, they should be interpreted as referring only to such ailments and injuries as affect the risk to be assumed, unless by express terms they preclude such interpretation.

Answers in Application.

Answers which are purely expressions of opinion are warranties of the bona fide belief and judgment of the applicant. Questions concerning the physical condition of the applicant, or anything that tends to shorten his life, do not invariably require absolute truth in answering.

False Answer.

An answer to a question concerning previous consultations of physicians which admits one examination, and omits others clearly proved, but does

[1] Reported in 102 N. W. 715.

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not purport to be a full and complete reply to all questions in that connection, and is accepted in its obviously incomplete form, is not affirmatively shown to have been false, so as to prevent recovery on the policy.

Appeal by defendant from an order of the district court for St. Louis county, Ensign, J., denying a motion for judgment notwithstanding the verdict or for a new trial, after a trial and verdict in favor of plaintiff for $513.31. Affirmed.

James Schoonmaker, for appellant.

John Jenswold, Jr., for respondent.

JAGGARD, J.

This action was brought to recover upon a certificate issued on the life of Emma Holmquist by the defendant, a fraternal benefit order. The insured was examined for insurance on April 13; her certificate, dated April 15, was countersigned by local officers and delivered on May 21; she died of consumption on September 9, 1903. The defense interposed both by pleadings and evidence was that the insurance was procured by false statements concerning health in the application and medical examination. The jury brought in a verdict for the beneficiary. Defendant moved for judgment notwithstanding the verdict, and, in case that motion was denied, for a new trial. From an order denying this motion, defendant appealed.

The court charged, in the language of all the defendant's own requests, in effect, that answers to questions asked were warranties, and not representations; more specifically, that, unless the applicant was in good sound physical health at the time of the application and delivery of the policy, there could be no recovery; that the exact and literal truth of the answers was a condition precedent to recovery herein; and that, if the applicant did not know the significance or severity of physical conditions and experiences, she was bound to state the exact and literal truth, and leave it to the defendant to determine, upon such statements, whether or not it would accept her application.

The real question which arose concerned the construction of the court upon the questions asked and the answers given.

In the early days of life insurance, the warranty was general, and guarantied sound mental and physical history and health. From time

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to time, inquiries were added, addressed to specific diseases and conditions. The result has been to avoid many policies which might have been held valid under the earlier requirements. Vose v. Eagle, 6 Cush. 42. The obvious purpose of such interrogatories is to protect the insurer against fraud, and to enable it to exclusively determine what risks it will accept or reject. "The parties may by their contract make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material." Phoenix Life Ins. Co. v. Raddin, 120 U. S. 183, 189, 7 Sup. Ct. 500. If the wording is univocal, then the truth and not the materiality of the answers determines the rights of the insured. Anderson v. Fitzgerald, 4 H. L. Cas. 483.

In the light of this purpose, the courts have construed certain clear warranties to be material, and have accordingly held that affirmative proof of any false answers thereto forfeits all rights under the policy. Price v. Standard L. & A. Ins. Co., 90 Minn. 264, 95 N. W. 1118. It is cases of this kind which appellant has called to the attention of this court. Thus there can be no recovery upon a demonstrated violation of a warranty, in not truthfully stating the facts as to anterior rejection by other companies, Webb v. Security Mut. Life Ins. Co., 126 Fed. 635, 61 C. C. A. 383, notwithstanding a state of facts concerning conditional delivery of application. Dimick v. Metropolitan, 69 N. J. L. 384, 55 Atl. 291; Moore v. Mutual, 133 Mich. 526, 95 N. W. 573; Jeffries v. Life Ins. Co., 22 Wall. 47; Anderson v. Fitzgerald, supra. Or previous consultations with physicians. Flippen v. State, 30 Tex. Civ. App. 362, 70 S. W. 787, collecting cases at page 788; Hubbard v. Mutual Res. Fund Life Assn., 100 Fed. 719, 40 C. C. A. 665; Moore v. Mutual, supra. Or age of applicant. Ætna Life Ins. Co. v. France, 91 U. S. 510. Or whether applicant was married or not. Jeffries v. Life Ins. Co., supra. Or that applicant had a rupture. Ætna Life Ins. Co. v. France, 91 U. S. 512. Or whether or not he had been an inmate of a hospital. Farrell v. Security Mut. Life Ins. Co., 125 Fed. 684, 60 C. C. A. 374. Or as to limitation to a recent inmate. Dimick v. Metropolitan, supra. Or that applicant followed a prohibited occupation. Mattson v. Modern Samaritans, 91 Minn. 434, 98 N. W. 330. Thus there are many instances in which no construction of the wording of questions and answers was found necessary.

But there are also many instances in which courts may properly see

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that complicated and ambiguous qualifications and conditions of applications and policies do not operate as a snare and sacrifice form for justice. Jeffries v. Life Ins. Co., supra. The purpose of warranties is to prevent, and not to perpetrate, fraud. It would be obviously unreasonable and unjust to allow insurance companies to habitually accept "average risks" by lowering the medical examination to that level, and then to permit them to defeat their policies, as occasion might arise, by insisting that the insured had failed in his insurance of the truth of some insignificant detail, having no bearing on good faith or on hazard, or of the conformity of an honest opinion with fact.

A construction of this application was made by the court. Its necessity will appear from a general consideration of its provisions, and more specifically from the objected part of the charge. The number of questions asked in the application here was one hundred twenty one. More than forty of these were inquiries as to whether or not she had ever had diseases. The investigation extended to her family and connections, lineal and collateral. The applicant was required to warrant only her good faith as to the family history, but, apart from construction, was made to guaranty opinions as to herself which no candid physician would be likely to assert with positiveness, and to insure against objective conditions which the company's own expert was unable to detect. Invariably, interrogatories of this kind are a medley of conclusions and facts. The answers called for are in part expressions of scientific opinion, and in part narrations of individual experiences. Upon its face, such an application requires the exact literal truth as to ailments, the precise nature of which an operation in major surgery might not reveal, and which only an autopsy could discover. The questions are not scientifically arranged, so that the classes of diseases are mutually exclusive. A number of them are but big bags to put many diseases in. Justice Harlan in Connecticut Life Ins. Co. v. Union Trust Co., 112 U. S. 250, at page 257, 5 Sup. Ct. 119, at page 123. It would require dialectical skill of no mean order to consistently interpret, and technical knowledge of no inconsiderable extent to accurately answer, all that is thereby required.

The construction in this case, [derived from an examination of the charge as a whole,] was, in the court's own apt and exact words, as follows:

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> These requests [viz., those just referred to, which held the answers to be warranties, not representations] are to be taken in connection with the instructions that the court gave you a moment ago. When questions propounded to an applicant as to her physical condition are in such terms as to include trivial ailments and injuries, unconnected with any specific disease, they should be interpreted as referring only to such ailments and injuries as affect the risk to be assumed, unless they are in words to preclude such interpretation. The presumption is that trivial ailments and injuries are not within the contemplation of the parties, and the words directing attention to them are not asked with a view or purpose of ascertaining the existence of the same, but what is the general condition of the health of the applicant.

This was specifically applied by the court to bronchitis, shortness of breath, spitting of blood, and chronic cough.

This restricted construction was correct. "All words, whether they be general in deeds or statutes or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter and the persons." Bacon, Law Max. Reg. 10; May, Ins. 183.

To construe this application in accordance with defendant's contention, so as to give its words their broadest import, although they are equally consonant with a sense limited to its purpose, leads to folly and demands the impossible. Witness its effect upon the failure of the applicant here to answer questions of pure fact complained of: "Number 20. Shortness of breath." This the applicant should answer by giving a list including all the times shortness of breath came from violent blows or fright or exercise. If she did not remember and correctly state the number of times she ran rapidly upstairs or to catch a street car, she could not recover. "21. Spitting of blood." If the applicant did not enumerate the number of teeth she had had pulled, she could not recover. Of negative answers to questions concerning existence of "open sore," and the like, Clark, J., in Home v. Gillespie, 110 Pa. St. 84, 1 Atl. 340, said: "These questions, it must be admitted, are in the most general terms, and if they are to be so read and understood, they are not only unreasonable, but absurd. A slight cutting of the finger with a penknife may for a time produce both an open sore and a swelling; the mere indisposition arising from cold is

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an illness; the stubbing of a toe is an injury; and the most trivial operations with hand or knife may be said to be surgical. It would be impossible for a person of mature years to remember, and absurd for the association to inquire, as to the common and trivial ailments or injuries he may have suffered from his earliest childhood, and it is unreasonable to suppose that these were in contemplation of the parties." The requirement of absolute truth, irrespective of its significance or its relevancy to risk, constitutes an impossible demand on human memory. Insurance Co. v. Wilkinson, 13 Wall. 222, 230.

The charge of the court formulated pertinent rules of law in harmony with the weight and tendencies of authorities. Chambers v. Northwestern Mut. Life Ins. Co., 64 Minn. 495, 499, 67 N. W. 367; Hubbard v. Mut. Res. Fund Life Assn., 100 Fed. 719, 40 C. C. A. 665, adverting to Jeffries v. Life Ins. Co., and like cases; and to Connecticut Life Ins. Co. v. Union Trust Co., and like cases; Miller v. Mutual, 31 Iowa, 216; Wilkinson v. Connecticut, 30 Iowa, 119; Insurance Co. v. Wilkinson, supra. And see Chinnery v. U. S., 15 App. Div. 515, 44 N. Y. Supp. 581; Mutual v. Wise, 34 Md. 582. And see Mattson v. Modern Samaritans, 91 Minn. 434, 98 N. W. 330, as to test of materiality.

Appellant calls attention to one question and answer with respect to which he made no specific request to charge.

> 49. Have you consulted or been attended by a physician during the last five years for a personal ailment or disease? Ans. Bilious attack. If so, for what? State nature, date, cause, duration, and effects. (No answer.)
>
> 50. Give name and address of physician or physicians. Ans. Dr. McClain, Fergus Falls.

The testimony showed conclusively that she had consulted other physicians during that period. These questions were ineptly asked and ineptly answered. Apart, however, from the failure of the appellant to request a charge with respect thereto, the partial answer of the applicant, which was true as far as it went, was accepted by the defendant with the blank space to one question not filled out. Both on facts and on the presentation of the legal question upon the record for review, this case is obviously different from those cases just referred to, which hold that a clear, untruthful answer to such a question forfeits the con-

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tract. This answer does not prevent recovery. Hale v. Life I. & I. Co., 65 Minn. 548, 68 N. W. 182.

The statements with respect to which the court was specifically asked to charge and did charge were numbered 2, 19, 20, 21, 22, 23, and 121. Of these, only 20 and 21 are, properly speaking, questions of pure fact, exclusive of opinion, namely: 20. Q. Shortness of breath? A. No. 21. Q. Spitting of blood? A. No. The charge of the court was correct as to these statements, in the light of previous consideration herein. A question essentially similar to question 21 received identical answer in Dreier v. Continental Life Ins. Co. (C. C.) 24 Fed. 671. The court held that "there is no warranty in this case that the insured never had spitting or raising of blood, but only that he did not have the complaint of spitting or raising of blood; equivalent to a warranty that he had not had blood spitting in such form as to be called a disease, disorder, or constitutional vice." And see Campbell v. New England, 98 Mass. 381. In Chattock v. Shawe, 1 Moody & Rob. 498, with respect to an applicant's answer that he had not been afflicted with fits, Lord Abinger, C. B., said: This means not that he "never accidentally had a fit, but that he was not * * * a person habitually or constitutionally afflicted with fits."

Statements numbered 2, 19, 23, and 121 involve expert opinion. No 22 also implies a conclusion. It accords with both reason and authority that, as to such matters of opinion, the answers will be deemed a warranty of only the bona fide belief and judgment of the applicant. Dimick v. Metropolitan, 69 N. J. L. 384, 55 Atl. 291, collecting authorities at pages 294, 295. The correctness of the submission to the jury of these statements by the court in this case will clearly appear upon more detailed examination:

No. 2 declared that the applicant was in good, sound physical health. Of such a statement, Lord Mansfield said: "Such a warranty could never mean that a man has not in him the seeds of some disorder. We are all born with the seeds of mortality in us. A man subject to the gout is a life capable of being insured, if he has no sickness at the time to make it an unequal contract." Note to Ross v. Bradshow, 1 Wm. Blackstone, *313. And see Jeffrey v. United Order, 97 Me. 176, 53 Atl. 1102, considering many cases.

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As to No. 19: "Q. Bronchitis? A. No"—there was practically no testimony, except that which was relied upon to prove No. 23, namely: "Consumption? A. No." This very statement illustrates the dilemma into which the Socratic method can unfairly put an applicant. The primary distinction between this case and Vose v. Eagle, 6 Cush. 42, upon which appellant properly places much reliance, is that in the Massachusetts decision the arbitrators to whom the case was referred found the facts against, whereas here the jury found them for, the applicant. In both cases the court held the statements to be warranties. Moreover, the testimony as to facts, and the issues as presented upon the record of exceptions and assignments of error, are essentially different.

No. 121 was as follows:

> Q. Is there anything, to your knowledge or belief, in your physical condition, family or personal history, or habits, tending to shorten your life, which is not distinctly set forth above? A. No.

In Watson v. Mainwaring, 4 Taunt. 763, Chambers, J., said: "All disorders have more or less a tendency to shorten life—even the most trifling; as, for instance, corns may end in a mortification. That is not the meaning of the clause. If dyspepsia were a disorder that tended to shorten life, within this exception, the lives of half the members of the profession of the law would be uninsurable."

These statements of bare facts and of facts and opinions were properly submitted to the jury, because, also, of the nature of the testimony introduced. The jury was entitled to judge of the credibility of witnesses, to ascertain the times when various essential facts occurred (especially, for example, the time of spitting blood), to consider the extremely favorable report of defendant's physician (especially as to failure to find evidence of consumption), and to determine the bearing and effect of a mass of relevant testimony upon the truth of these statements of the applicant. Price v. Standard Life & Accident Co., 90 Minn. 264, 269, 95 N. W. 1118; Hale v. Life I. & I. Co., 65 Minn. 548, 560, 68 N. W. 182.

The conclusions here reached cover what the defendant refers to as "the substantial points on the merits of this case," and essentially de-

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termine some other assignments of error, including the claim that the applicant failed to notify the defendant of deterioration in her health after her application required by the by-laws. The appellant assigned other errors which are not material to this decision.

Order affirmed.

JOHN C. SODINI v. CLARA SODINI.[1]

March 3, 1905.

Nos. 14,011—(52).

Decree of Divorce.

A default judgment in divorce proceedings is protected against collateral attack by the same conclusive presumptions of validity and by the same favorable intendments which surround any other judgment.

Return of Service of Summons.

If the language of the return of service of summons and complaint in a default divorce judgment fairly admits of an interpretation which will make that return legal and sufficient, it should be so construed upon collateral attack.

Same.

When the return on which default judgment in divorce is based shows that the summons and complaint were properly and personally served on the defendant, it is immaterial that the officer making the service also certifies that the name by which the defendant was described in the papers served was not his true name, but only an alias.

Service in Foreign State.

Personal service of complaint and summons in divorce proceedings outside of the state is sufficiently authorized by sections 4796, 4797, G. S. 1894.

Action in the district court for Hennepin county for an absolute divorce from the bonds of matrimony. Defendant, answering, set up a counterclaim, and also prayed for a divorce and for alimony. From orders, Pond, J., overruling a general demurrer to the answer, and allowing defendant temporary alimony, suit money and counsel fees, plaintiff appealed. Orders affirmed.

[1] Reported in 102 N. W. 861.

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Lane & Nantz and *Henry S. Mead,* for appellant.
Stan J. Donnelly and *Harry Weiss,* for respondent.

JAGGARD, J.

The original complaint herein sought an absolute divorce from defendant because of adultery. The answer, after a general denial, also sought an absolute divorce because of adultery and cruel and inhuman treatment. Subsequently plaintiff amended his complaint, and therein sought to annul the marriage of plaintiff to defendant because of the following facts. In 1894, at Milwaukee, Wisconsin, the defendant married Robert J. Nelson. In 1895 she began an action in the district court of Hennepin county, Minnesota, where she was then residing, against Robert J. Nelson for divorce, on the ground of cruel and inhuman treatment. Personal service of the summons and complaint therein was thereafter made upon the defendant at Philadelphia, Pennsylvania. Such proceedings were thereafter duly had in said action that on December 12, 1895, a judgment of divorce was rendered therein in favor of the plaintiff. On June 7, 1902, defendant became the wife of this plaintiff. In November of the following year this action for divorce was begun. The plaintiff, in his amended complaint, claimed that this judgment of divorce in said case of Nelson v. Nelson is void upon its face, because the record affirmatively shows that the summons and complaint therein were never in fact served upon the defendant, Nelson. This claim is spelled out of the officer's return of the service of the summons and complaint upon the defendant therein at Philadelphia, hereafter stated.

The defendant by her answer denied her incapacity to marry plaintiff, and alleged a regular divorce from the former husband, and asked for attorney's fees, suit money, and alimony. Plaintiff demurred to this answer on the grounds (1) that the aforesaid facts relating to the divorce of Clara Nelson from Robert J. Nelson failed to show a valid divorce; (2) that, in a proceeding to annul a marriage, no allowance for temporary alimony could be allowed upon a counterclaim seeking a divorce on the grounds of adultery and cruel and inhuman treatment. From an order overruling this demurrer, and from an order allowing temporary alimony, counsel fees, and suit money, plaintiff appealed.

1. A judgment of a court of superior or general jurisdiction cannot be collaterally attacked unless the record affirmatively shows want

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of jurisdiction. The cases sustaining this familiar and undisputed rule will be found collected in 30 Cent. Dig. §§ 933, 934; Black, Judg. §§ 224, 263. A number of federal cases will be found collected in Southern Pac. R. Co. v. U. S., 168 U. S. 1, 51, 18 Sup. Ct. 18, 27. And see Turrell v. Warren, 25 Minn. 9; Nye v. Swan, 42 Minn. 243, 44 N. W. 9; Gulickson v. Bodkin, 78 Minn. 35, 80 N. W. 783; Hotchkiss v. Cutting, 14 Minn. 408 (537); State v. Macdonald, 24 Minn. 48. A default judgment in divorce proceedings is no more subject to such collateral attack than any other judgment. In re Newman's Estate, 75 Cal. 213, 16 Pac. 887; 2 Current Law, 595; Ruppin v. McLachlan, 122 Iowa, 343, 98 N. W. 153.

In Last Chance Mining Co. v. Tyler Mining Co., 157 U. S. 683, 691, 15 Sup. Ct. 733, Justice Brewer said: "But a judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest. The essence of estoppel by judgment is that there has been a judicial determination * * * and not upon what evidence, or by what means was it reached." The conclusive presumption of validity extends to the return of process upon which the judgment is based. 40 Cent. Dig. § 193. All intendments are indulged in support of the judgments of courts of general superior jurisdiction. 30 Cent. Dig. § 934. Thus informalities, including errors in the name of the person designated in the return of service of summons, are not sufficient basis for indirect impeachment of a judgment. Hollingsworth v. State, 111 Ind. 289, 12 N. E. 490; Smith v. Bradley, 14 Miss. 485; Campbell v. Hays, 41 Miss. 561; Crizer v. Gorren, 41 Miss. 563; Rigby v. Lefevre, 58 Miss. 639; Kelly v. Harrison, 69 Miss. 856, 12 South. 261; Oswald v. Kampmann (C. C.) 28 Fed. 36; Peck v. Strauss, 33 Cal. 678; Wilson v. Call, 49 Iowa, 463. And if the language of the return fairly admits of a construction which will make the return legal and sufficient, it should be so construed. Curtis, J., in Coggswell v. Warren, 1 Curt. 223, Fed. Cas. No. 2,958; Murfree, Sher. § 864.

Plaintiff here contends that the judgment of divorce of the defendant from her former husband in the case of Nelson v. Nelson is void even on collateral attack; that the proof of service therein shows on its face the service of the summons and complaint, aimed at a man whose true name was Robert J. Nelson, upon a man whose true name was

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John S. Bradley, but who sometimes passed under the name of Robert J. Nelson; and that, inasmuch as the person whose real name is John S. Bradley is not the same as one whose true name is Robert J. Nelson, the court never acquired jurisdiction. The sheriff serving the summons and complaint, however, certified that he personally knew the defendant, that at a specified time and place he served said papers upon said defendant by handing to and leaving with him a true and correct copy thereof, and that he knew the person served as aforesaid to be the person named as the defendant therein. It is true that he also certified that the defendant's true name was not Robert J. Nelson, but John S. Bradley, and that the name Robert J. Nelson was an alias. This does not, however, take this case out of the rule that every intendment is in favor of a construction which will sustain the judgment. There was nothing in the summons and complaint, as served, to deceive the defendant. The real person was in fact served. It is the intention of the law that the service should be made, not on the name, but on the person. Accordingly the construction applied by the trial court, sustaining the judgment, is the proper one.

2. It was further urged that there was no authority for personal service of summons and complaint outside the state. R. S. 1851, p. 335, c. 70, § 51, authorized such service. After a learned examination of the statutes, counsel for plaintiff asserts that this provision was repealed in 1866, and not re-enacted until 1901, and that, since the divorce of defendant herein from her former husband was procured in 1895, and was based on such service, it is void. It is not necessary to consider here in detail the merits of this argument as to such legislative history. G. S. 1894, §§ 4796, 4797, sufficiently, if inferentially, authorize the actual service here made.

3. There is no merit to the further contention in plaintiff's demurrer that, since this is an action to annul marriage, the defendant cannot therein secure a divorce on the ground of adultery and cruel and inhuman conduct, and that therefore the court may not order temporary alimony. Especially in view of the history of the pleadings in the case, the trial court properly held that

> There can be no good reason given why the rights of the respective parties in an action of this kind may not be litigated and determined without driving them to separate lawsuits.

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* * * To deny the defendant this relief in this action would be to prolong these domestic troubles and multiply the lawsuits between the parties, and largely increase the costs and expenses of litigating their respective rights.

4. This court has examined the orders for alimony and suit money, and finds no abuse of the discretion of the trial court or other error therein.

The orders appealed from are sustained.

MELVIN B. BRYANT and Others v. NELSON-FREY COMPANY and Others.[1]

March 3, 1905.

Nos. 14,137—(201).

Correction of Findings.

This court will not revise findings of fact made by a trial court, to correct which no motion was made therein, where there is no bill of exceptions or settled case, nor a return purporting to contain all the proceedings and evidence.

Same.

Nor will it consider whether such finding of fact is sustained by the evidence, unless specifically assigned as error.

Review on Appeal.

The only question presented by such a record is whether or not the findings of fact sustain the conclusions of law.

Payment of Taxes.

Voluntary payment for a number of years of taxes on the vacant land of another, by a stranger to the title, under the mistaken belief that he had a tax deed to the land, creates no obligation on the part of the owner of the land to repay. Nor can the prepayment of such taxes be made a condition precedent to a decree of title in the record owner, based on unassailed findings of fact that no tax deed or certificate had ever been issued to the person so paying taxes.

Action in the district court for Crow Wing county to determine the adverse claims of defendants to vacant and unoccupied land. The

[1] Reported in 102 N. W. 859.

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case was tried before McClenahan, J., who found in favor of plaintiffs. From a judgment entered pursuant to the findings, defendant Nelson-Frey Company appealed. Affirmed.

Wilson & Mercer, for appellant.

Alderman & Mantor, for respondents.

JAGGARD, J.

This was an action to determine adverse claims. The plaintiffs and respondents alleged that they held the record title to certain vacant land. Defendant and appellant claimed that it owned the land through a tax deed, attached as an exhibit to its answer; that plaintiffs were estopped to assert ownership; and that, in case ownership were found in plaintiffs, a decree to that effect should be conditioned on precedent payment by plaintiffs of taxes paid by defendant, with interest. The court, hearing the case without a jury, expressly found, upon a stipulated statement of facts, that plaintiffs had record title to the land; that "no state assignment certificate or other tax certificate or deed was ever issued or made or delivered to anyone for or on account of such taxes, or the payment thereof"; and that defendant and its grantors had for many years paid taxes upon the land, which, with interest, amounted to $313.50, under the belief that the property was their own. Judgment was ordered and entered for plaintiffs, and refusing defendant all relief. Defendant moved the court to change the conclusions of law, inter alia, so as to provide for payment by plaintiffs of taxes and interest as aforesaid, as a condition precedent to relief. The court denied that motion. Defendant appealed from the judgment.

The paper book on appeal, in many respects a model of brevity, contains no testimony, and consists merely of the pleadings, the findings of fact and conclusions of law, the motion to correct conclusions of law, and order denying that motion, the judgment itself, and the usual appeal papers. The stipulation, not in the printed paper book, but in the return, attached to the judgment roll, admitted the records showing that the deed was undoubtedly void, and qualifiedly admitted the deed, so as at least to dispense with the production of the original or a certified copy, and to allow the use as such of a copy attached as an exhibit, and to allow plaintiffs to object to the introduction of the same in evidence as upon offer in an ordinary trial. After the argument here, this court, of its own motion, called attention of counsel

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of both parties to the finding by the trial court that defendant had no tax deed or certificate. Thereupon counsel for defendant urged that this court should not consider the question of validity or invalidity of the deed, but should simply say that these taxes, regularly and duly assessed, and paid by defendant in good faith, must be repaid by plaintiffs before any relief should be granted, or that, if the record is held improper, this court should remand the case without prejudice to defendant's right to apply to the trial court for correction of its findings of fact.

1. It is impossible to accede to either proposition. A court of appeals passes only on questions appearing in the record, and presented to it by proper assignments of error. It will not revise findings of fact unless the record purports to contain all the evidence and proceedings before the trial court. Here there is no bill of exceptions, nor a settled case, nor any certificate that all proceedings and evidence have been returned. It does not affirmatively appear that the court did not construe the stipulation to require profert of the deed to defendant—an interpretation at least debatable—that no such profert was in fact made, and that therefore the finding in fact was not correct. The record here leaves it impossible for this court to determine or to do more than conjecture what happened on trial. No motion was made to correct any findings of fact. Under such circumstances this court will not presume that the return shows all the evidence and proceedings, and that the learned trial court was guilty of error in its findings of fact. Boright v. Springfield F. & M. Ins. Co., 34 Minn. 352, 25 N. W. 796; Stevens v. Stevens, 82 Minn. 1, 84 N. W. 457. The assignments of error wholly failed in any way, definitely or indefinitely, generally or particularly, to refer to the alleged error of the court in this finding of fact. Accordingly the invariable rule must be applied, and this court refuses to consider errors not assigned. "When the error specified is that the finding of the court below or referee is not sustained by the evidence, it shall specify particularly the finding complained of." Rule 9, subd. 3, as amended February 1, 1895 (60 Minn. v). And see City of Owatonna v. Christianson, 83 Minn. 53, 85 N. W. 909; Dunnell, Pr. § 1794; 2 Shipman, Pr. §§ 967, 968.

2. The only question before this court for determination on the merits, accordingly, is whether the trial court properly deduced its conclusions of law from the facts found. These facts show payment

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for many years of taxes on vacant land by a stranger to the title, under a mistaken belief that he had title, although no deed or certificate of any kind had been delivered to him. The prepayment of taxes is properly and universally made a condition precedent to the setting aside of a tax deed or certificate, or to clearing a cloud on title cast thereby. But here a tax deed or certificate appears only in defendant's answer and in the qualified stipulation, inoperative here because of the incomplete record presented. No relief is granted with respect thereto. In legal effect, the defendant had no deed or certificate. This is therefore not at all a case involving the rights and remedies of a purchaser of an invalid tax title, and is not to be determined by the principles governing such a case. The payment operated merely as a discharge of the lien of the taxes. The money so paid is lost to the payer, in the absence of extraordinary circumstances, like prolonged and wholly uncertain litigation, during which taxes paid preserve the property for the successful litigant.

The mere voluntary performance of another's duty is not of itself the basis of an obligation. A man may not, by his own unauthorized act in paying taxes on the land of another, make that other his debtor, or acquire any lien on or equitable right in that land. Beard v. Horton, 86 Ala. 202, 5 South. 207; Iowa v. Davis, 102 Iowa, 128, 134, 71 N. W. 229; Goodnow v. Moulton, 51 Iowa, 555, 2 N. W. 395; Stryker v. Goodnow's Administrator, 123 U. S. 527, 540; Homestead Co. v. Valley Railroad, 17 Wall. 153, 166; Fulton v. Aldrich, 76 Vt. 310, 57 Atl. 108; Coles v. County of Washington, 35 Minn. 124, 128, 27 N. W. 497; Town v. Village, 106 Wis. 25, 81 N. W. 989.

On the facts here presented, there could be no recovery in a direct action against the owner of the land, even if he might have known that the taxes were paid under claim of title. Garrigan v. Knight, 47 Iowa, 525. And see Janeway v. Burn, 91 App. Div. 165, 86 N. Y. Supp. 628; Smith v. Schroeder, 15 Minn. 18 (35). Nor against county or state. Van Nest v. Sargent, 7 N. D. 139, 73 N. W. 1083; Shane v. City of St. Paul, 26 Minn. 543, 6 N. W. 349; 45 Cent. Dig. 1351, 1352, § 1001. Under the very peculiar circumstances of this case, it would be a violation of all precedent and principle to allow that to be done indirectly which could not be done directly. Shillock v. Gilbert, 23 Minn. 386; Burdick v. Bingham, 38 Minn. 482, 484, 38 N. W. 489.

Judgment affirmed.

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FRANK H. STAUFF v. GEORGE H. BINGENHEIMER.[1]

March 3, 1905.

Nos. 14,173—(209).

Motion to Direct Verdict—Severable Contract.

Action to recover commissions which the plaintiff claims to have earned pursuant to a special contract set out in the opinion. *Held:*

1. A motion by each party that a verdict be directed in his favor cannot be construed as a waiver of the right to have the facts passed upon by the jury, or as an agreement to submit them to the trial judge in case the motion be denied.

2. The contract is not void for want of mutuality of obligation, but it is based upon a sufficient consideration.

3. Where the part of a contract to be performed by one party consists of separate and independent items, and the consideration therefor is apportioned to each item, the contract is severable. The contract in question is severable.

4. The trial court erred in directing a verdict for the defendant.

Action in the district court for Hennepin county to recover from defendant $4,556.74 and interest, claimed to have been earned as commissions in the sale of land under the contract set out in the opinion. The case was tried before Willard R. Cray, J., who directed a verdict in favor of defendant. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, plaintiff appealed. Reversed and new trial granted.

Arthur W. Selover, for appellant.

Flannery & Cooke, for respondent.

START, C. J.

Action to recover commissions, which the plaintiff claims he earned as agent for the defendant in the sale of certain tracts of land pursuant to an alleged contract, which is in these words:

Minneapolis, Minn. Aug. 11, 1903.

1. Mr. F. H. Stauff.

Dear Sir:—It is agreed that I will deed to A. C. Lamport N. E. ¼ section 19–136–80; S. ½ sec. 25–136–81; S. ½ of S.

[1] Reported in 102 N. W. 694.

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W. ¼, and S. W. ¼ of S. E. ¼, sec. 3–138–81; all of sec. 5–139–81, Morton Co., N. D., for a stated consideration of $7,493.70; will send deed to same to Lake City bank at Lake City, for delivery upon payment for my account of $4 per acre, or, $4,986.96; balance of consideration to be paid or delivered to you.

2. I also agree to make deed to Oscar Anderson and Oliver Carlson to sec. 11–136–81, Morton Co., N. D. and send same to same bank, with same directions, stated consideration $3,840, with directions to deliver same to your order upon receipt for my account of $4 per acre, cash, or $2,560. Balance of consideration to go to you.

3. I also agree to deed or assign contracts to you personally the S. E. ¼ sec. 19–136–80; East half, S. W. ¼ and the E. ½ of N. W. ¼ sec. 9–138–81; stated consideration $5,000, actual consideration, $4 per acre, or $2,880, cash.

4. You shall have credit for $480 on sale to Frutel, when the same is closed; credit to be given on your own purchases.

5. If I can get back the S. W. ¼ of 12–139–82 will deed it at $4 to anyone you say, you to have all over that. If I cannot get it back, will allow you a credit on your purchases of $320 cash.

6. Will deed or assign contracts on your own purchases leaving amount unpaid to N. P. Ry. or N. W. Imp. Co. for you to pay, and which will reduce by such amount the balance you will have to pay for those assignments or deeds; cash to be paid in St. Paul Exchange.

7. Direction shall be given the bank to deliver the deeds or any of them at any time between now and close of business on the 25th day of September, 1903.

Geo. H. Bingenheimer.

Accepted:

F. H. Stauff.

We have numbered the several provisions of the contract for convenience.

The complaint alleged several separate and independent sales of different parcels of land. The answer admitted that the defendant signed the contract, and alleged, in effect, that its terms were never performed

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by the plaintiff, and that he abandoned it. At the close of the evidence each party moved the trial court to direct a verdict in his favor. The motion of the defendant was to the effect that the jury be instructed to return a general verdict for him for the reason that upon all of the evidence the plaintiff was not entitled to recover any sum whatever. The court denied the plaintiff's motion, and granted that of the defendant. A verdict was returned accordingly. The plaintiff appealed from an order denying his motion for judgment in his favor notwithstanding the verdict, or for a new trial. The principal question presented by the record for our decision is whether the court erred in directing a verdict for the defendant.

1. The first contention of the defendant to be considered is that, each party having requested the trial court to direct a verdict in his favor, the plaintiff waived his right to have any question of fact submitted to the jury, and is now estopped from claiming that the case should have been submitted to the jury.

The rule contended for has been adopted in some other jurisdictions. 6 Enc. Pl. & Pr. 703. But it is not consistent with the uniform practice in this state from the beginning. A motion or a request for a directed verdict presents under our practice a question of law only. Such a motion or request is frequently made by counsel at the close of the evidence for the purpose of securing a ruling of the trial court upon some special question of law which is deemed to be decisive of the case, or for otherwise conserving the rights of his client. Now, to hold that when a party makes such a motion the opposite party, by making a counter motion for a directed verdict, may deprive him of the right to a jury trial in case the court should differ from him as to the law, would in practice result in great injustice. It would be a strained and unjust construction to hold in such a case that the party first making the motion thereby admitted that, if his own motion be denied, the motion of his adversary should be granted, or that he waived a jury trial, and consented that the trial judge might decide the case in accordance with the preponderance of the evidence. It cannot be fairly assumed, from the mere fact that a party makes a motion or request for a directed verdict in his favor, that he concedes anything except for the purposes of his motion. He admits for such purpose the credibility of the evidence against him, and every

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fact and inference which may be fairly drawn therefrom in favor of his adversary. If, however, upon such concession, the court rules that the party making the motion is not, as a matter of law, entitled to a verdict in his favor, and he does nothing to waive his rights except to make the motion, it is then the duty of the court to submit the case to the jury, unless the opposite party is, upon the evidence, as a matter of legal right, entitled to a verdict in his favor.

We therefore hold that a motion by each party to an action that a verdict be directed in his favor cannot be construed as a waiver of the right to have the facts passed upon by the jury, or an agreement to submit them to the trial judge in case the motion be denied. Poppitz v. German Ins. Co., 85 Minn. 118, 88 N. W. 438; Thompson v. Brennan, 104 Wis. 564, 80 N. W. 947.

In this case the plaintiff did nothing to waive his rights except to move the court to direct a verdict in his favor. On the contrary, he excepted at the time to the action of the court. It is obvious, then, that if the evidence made a case for the jury as to plaintiff's right to recover for any commissions whatever, the court erred in directing a general verdict for the defendant.

2. It is further urged by the defendant that there was no consideration for the contract of August 11, 1903, as there was no mutuality of obligation, in that the plaintiff was not bound by its terms to do anything. The plaintiff gave evidence on the trial tending to show that the plaintiff had been acting as the agent of the defendant for the sale of land for some time before the written contract was entered into, and had then procured purchasers for the separate tracts of land—one to Gerhart Frutel, one to Ben Gurnes—and on each claimed he was entitled to a commission of $480; that he had also found purchasers for other tracts, namely, A. C. Lamport and Oscar Anderson and Oliver Carlson, who were ready to buy as soon as proper abstracts and deeds could be obtained; and, further, that as a compromise of the plaintiff's claims the contract in question was made. The evidence was not inconsistent with, nor did it tend to vary, the terms of the contract. The contract, by necessary implication, assumes that there had been prior negotiations of some kind between the parties named therein for the purchase of the lands, and that the plaintiff claimed commission for the other sales. The evidence was competent for the purpose

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of showing a consideration for the contract. If the plaintiff's claims, amounting to $960, for commissions on the two alleged sales, were settled by the acceptance of the defendant's contract whereby the claims were reduced to $160, and the balance made payable only in case the plaintiff purchased certain other lands of the defendant by crediting the amount on the purchase price thereof (see subdivisions 3, 4, and 5 of the contract), there was ample consideration for the contract. The evidence was sufficient to sustain a finding by the jury that such was the consideration for the contract.

Again, the plaintiff accepted and signed the contract, and with the knowledge and consent of the defendant, and undertook the performance thereof. Lapham v. Flint, 86 Minn. 376, 90 N. W. 780. The cases of Bailey v. Austrian, 19 Minn. 465 (535), Tarbox v. Gotzian, 20 Minn. 122 (139), and Ellsworth v. Southern Minn. Ry. Ex. Co., 31 Minn. 543, 18 N. W. 822, are not applicable to the facts of this case.

3. The next question to be considered is whether the contract is severable or entire. Where the part of a contract to be performed by one party consists of separate and independent items, and the consideration therefor is apportioned to each item, the contract is severable. Spear v. Snider, 29 Minn. 463, 13 N. W. 910; McGrath v. Cannon, 55 Minn 457, 57 N. W. 150.

It is clear from the mere reading of the contract that it is severable within the rule stated. The defendant agrees by subdivision 1 of the contract to deed the land described therein to the party, and for the consideration therein stated, and fixes the part of the purchase price to be paid to the plaintiff. This is a complete agreement in and of itself, except the time of the performance which is fixed by subdivision 7. Subdivisions 2 and 3 are also separate and independent obligations. Or, in other words, the defendant agreed to deed the particular land for the particular consideration named in each of the subdivisions 1, 2, and 3 of his contract, and by subdivision 7 he undertook to cause the deeds, or any of them, to be delivered on or before September 25, 1903. The contract, in legal effect, was that the defendant would deed the land in each case to the purchaser named, and allow the plaintiff for his services or commissions the difference between the consideration to be paid by the purchaser and the net sum to be paid himself. Vaughan v. McCarthy, 59 Minn. 199, 60 N. W. 1075. It follows that if the

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defendant performed, or duly offered to perform, the conditions of one or more of the several agreements of the defendant to deed the land therein described, the plaintiff is entitled to recover the stipulated compensation in each of such cases.

4. This brings us to the question whether the evidence would sustain a verdict for the plaintiff on one or more of the agreements. The evidence is somewhat complicated. However, upon a full consideration of it, we have reached the conclusion that the evidence was sufficient to take the case to the jury upon the agreement contained in the first and second subdivisions of the contract, the alleged sales to Lamport and to Anderson and Carlson, respectively. As to the first the evidence tends to show that by consent of parties the defendant, in place of making deeds for all of the land, was to assign certain contracts made by the Northwestern Improvement Company; that the defendant, between August 11 and September 25, 1903, sent to the bank designated in the contract the abstracts of title, a deed, and assignments of the contracts of the land, which were in fact defective, and upon Lamport's objection they were returned for correction at the instance of the plaintiff; that the plaintiff and Lamport were able, ready, and willing to perform the agreement on their part up to October 2, but not after that date; and, further, that the title papers which had been returned for correction did not reach the bank until October 7.

The defendant claims that the evidence conclusively shows that the plaintiff prevented the fulfilment of the agreement by the defendant within the specified time in the contract; hence he cannot, as a matter of law, recover on the first agreement. The evidence makes the question one of fact, which includes the question of the plaintiff's diligence in informing the defendant of the objections and in returning the papers to the bank. This is necessarily so, for, if the plaintiff undertook to notify the defendant of the objections to the title, and caused the papers to be returned for correction, he was bound to wait a reasonable time for their return, although such time exceeded the limit fixed in the contract, before he could abandon the contract and claim the stipulated compensation. What would constitute such reasonable time was a question of fact. Roberts v. Mazeppa Mill Co., 30 Minn. 413, 15 N. W. 680.

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As to the agreements contained in the second subdivision of the contract there is no serious claim made by the defendant that the parties therein named were not ready, able, and anxious to take deeds for the section of land therein described, each taking a deed for one-half thereof. But he claims that his contract was not to divide the section and make a separate deed for each part to the separate purchasers. The evidence, however, is sufficient to justify a finding that after the making of the contract the parties agreed that the land might be thus divided, and, further, that the defendant made the deeds accordingly, and sent them to the bank, which refused, under his instructions, to deliver them, although the full purchase price of the whole section was tendered.

The plaintiff claims that he is entitled to recover commission on the Frutel and Gurnes sales. It is clear, as a matter of law, that he cannot, for by the terms of the contract their payment was to be made by crediting the amount thereof on the purchase price of the land described in subdivision 3 of the contract. No claim is made that he ever complied with the conditions of this agreement. He, however, claims that there was no consideration for the agreement as to this conditional method of payment. The consideration was the defendant's contract, as we have stated.

Order reversed, and new trial granted.

ROBERT RICHARDSON v. HENRY F. DAVIS.[1]

March 3, 1905.

Nos. 14,197—(214).

Use of Streets.

Foot passengers and drivers of vehicles have equal rights on the streets of a city. Neither is required to anticipate negligence; both are bound to exercise commensurate care to avoid injury. If the negligence of a person hurt, while properly on a highway, has in any degree caused his own harm, he cannot recover damages from another person, in the proper use of such highway, who may also have contributed thereto.

[1] Reported in 102 N. W. 868.

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Negligence and Contributory Negligence.

Therefore, where a city laborer engaged in repairing sidewalks leaves his tool cart at an angle to and six or more inches away from the curb of a generally traveled street only thirty three feet wide at a point opposite which are wagons and teams in the same street, and, to get spikes from the cart, unnecessarily puts his foot between the cart and the curb, and who in this position is hurt by the striking of the extending push handles, or of projecting planks on the cart, by the defendant's wagon going at a walk or slow trot, the questions of negligence and contributory negligence are for the jury, under appropriate instructions by the court.

Action in the district court for St. Louis county to recover $1,596 for personal injuries. The case was tried before Ensign, J., and a jury, which rendered a verdict in favor of plaintiff for $500. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed and new trial granted.

Davis & Hollister, for appellant.

John Jenswold, Jr., for respondent.

JAGGARD, J.

This was an action for damages suffered by plaintiff on a highway. The plaintiff and respondent was in the employ of a city as a laborer repairing sidewalks. On the day he was injured he had been at work on Michigan street, a principal wholesale and a much traveled street of Duluth, thirty three feet wide between the curbstones. The plaintiff left the cart, which he was using in his work, standing about six inches or a foot from the curb, upon the paved portion of the street. This cart had a box about three feet square and twelve inches deep, which rested upon an axle, set into two wheels, three feet high, so that the wheels were within two or three inches of the box. The width of the cart, including the hub, was about four feet. At one end of the cart was a handle bar projecting some two and a half or three feet, by means of which the cart was pushed along. This cart contained a plank sixteen feet long, and some four or five other short planks, loaded over its center. It stood at a little, but undetermined, angle with the curb, so that the handle bar extended into the street in the direction in which defendant's team was coming. On the side of the street opposite to that to which the cart was nearest, there were at the time of plaintiff's injury teams standing with wagons backed up towards the

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curb, so that the horses stood out into the street. Plaintiff, directed by his boss to get some spikes from the cart with which to nail down the sidewalk, put his right foot down between the curb and the wheel to reach the spikes. While he was in this position, the defendant's wagon came along on a walk or on a slow trot, struck the handle bars of the cart or came in contact with the planks with the whiffletree or hub of the wagon, knocked the plaintiff down, and did the damage of which complaint is here made.

There was testimony to the effect that the space through which the defendant's vehicle was to pass was very narrow; that there was just barely room enough for the wagon to get by, and that there was not room enough for it to go by without contact; and that at the time the cart was struck the driver touched the pole of the team on the other side. There was other testimony to the effect that another driver, to get through, was compelled to go "at an angle," and that in so doing he rubbed against another team on the side opposite the cart, and then drove so as to "straighten out into the road." The court submitted to the jury the question as to the negligence of the defendant, but, construing the charge as a whole, did not charge that plaintiff could not recover if he was guilty of contributory negligence, and refused to give properly worded requests by defendant to charge that plaintiff could not recover if he was so guilty. The jury returned a verdict for plaintiff. Defendant moved for judgment notwithstanding the verdict or for new trial. From an order denying the motion, defendant appealed.

Foot passengers and those driving wagons have equal rights on the streets of a city. Each must use this right in a reasonable manner. Both are required to exercise care commensurate with the risk involved under the circumstances of each case to avoid harm. Adolph v. Central Park, 76 N. Y. 530. The authorities on this well-settled rule will be found collected in 25 Cent. Dig. §§ 461, 462, cc. 1924–1931, and Elliott, Roads & S. (2d. Ed.) 911, § 834. And see Brooks v. Schwerin, 54 N. Y. 343; Barker v. Savage, 45 N. Y. 191. This plaintiff had a perfect right to do as he did; but he was under an equal duty in so doing to exercise reasonable care with reference to the conditions existing at the particular time and place, viz., the character of the street, its use by passing vehicles, its width, and the extent to which it was

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filled by his own cart and by horses and wagons across the way. He was not required to anticipate negligence on the part of this defendant or of others, but he was bound not to be guilty of contributory negligence on his own part.

There is no reasonable basis for the claim that defendant was guilty of wanton negligence. The circumstances of the case, the attention of the driver to the situation, the manner in which he drove, including his rate of speed and the space through which he went, do not furnish any evidence of wantonness to be submitted to the jury; still less to be held, as a matter of law, to be of such a character as to exclude the defense of contributory negligence.

This case is obviously different from instances, cited by plaintiff, in which men engaged at work on the streets are required to be there in the performance of their work. Plaintiff here could have reached the spikes without going on the street at all, or he could have waited a moment until defendant's wagon had passed.

The ordinary rule as to contributory negligence applies. A party is not entitled to redress for an injury sustained in a highway, where his own carelessness or negligence has contributed in any degree, greater or less, to the injury. Brooks v. Hart, 14 N. H. 307; Coombs v. Purrington, 42 Me. 332; Schaabs v. Woodburn, 56 Mo. 173. The court erred in refusing defendant's request to charge as to contributory negligence.

Reversed and new trial ordered.

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STATE v. GEORGE E. WILLIAMS.[1]

March 10, 1905.

Nos. 14,058—(21).

Fornication.

A single act of sexual intercourse between a man and an unmarried woman does not constitute the crime of fornication within the meaning of section 6557, G. S. 1894. "Cohabit" as used in that statute means to live and dwell together.

Defendant was convicted in the municipal court of Mankato of the offense set forth in the opinion and appealed from the judgment of conviction and from an order, Plymat, J., denying a motion for a new trial. Judgment and order reversed.

H. L. & J. W. Schmitt, for appellant.

Edward T. Young, Attorney General, and *George T. Simpson,* Assistant Attorney General, for the State.

PER CURIAM.

Defendant was prosecuted under section 6557, G. S. 1894, for fornication, and appealed from an order denying his motion for a new trial.

The assignments of error present the question whether the evidence makes out a case of fornication within the meaning of the statute above referred to. The facts are that defendant and an unmarried woman occupied the same room at a hotel in Mankato, and had sexual intercourse with each other, on the night of April 3, 1904. There was no showing to the effect that the parties lived together as husband and wife, or otherwise, and none that any act of sexual intercourse took place between them other than on this occasion. Does this constitute fornication within the meaning of the statute? We think not. The statute under which the prosecution was conducted provides that if "any man and single woman cohabit together, they shall be both guilty of fornication," etc.

The word "cohabit," as used in statutes of this character, has a well-defined legal meaning, namely to live and dwell together, in which sense

[1] Reported in 102 N. W. 722.

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the legislature must be deemed to have used it in enacting this statute. The usual canons of construction will not warrant its interpretation in any other light. It follows, necessarily, that a single act of sexual intercourse between a man and a single woman is not such cohabiting or dwelling together as constitutes the crime of fornication as defined by our statutes. State v. Chandler, 132 Mo. 155, 33 S. W. 797; Luster v. State, 23 Fla. 339, 2 South. 690; Pruner v. Commonwealth, 82 Va. 115; Turney v. State, 60 Ark. 259, 29 S. W. 893.

The "Revised Laws" recently reported to the legislature by the Statutes Revision Commission remedies this apparent defect in our statutes.

Judgment and order reversed.

STATE v. UNION TANK LINE COMPANY.[1]

March 10, 1905.

Nos. 14,105—(24).

Foreign Corporation—Tax on Personal Property.

Proceedings for the enforcement of personal property taxes assessed against the defendant upon thirty three railroad tank cars owned by it, which were within the county of Ramsey on May 1, 1902.

The trial court found that the defendant is a nonresident corporation; that it had no agent, office, or place of business within this state at any time; that the cars, at the time they were assessed, were engaged in and were mere instruments of interstate commerce, and were in the actual transit, and only temporarily within this state, and were not detained longer than was necessary for unloading and transferring them.

Held, the findings of fact are sustained by the evidence, and, upon the facts found, that the cars were not taxable in this state.

In proceedings in the district court for Ramsey county to enforce payment of personal property taxes delinquent for the year 1902, defendant Union Tank Line Company interposed an answer alleging that it was a foreign corporation having no officer or agent in Minnesota

[1] Reported in 102 N. W. 721.

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and that on May 1, 1902, the personal property on which the tax sought to be collected was levied was only temporarily within the state and that the same was not taxable. The case was tried before Olin B. Lewis, J., who found in favor of defendant. From a judgment entered pursuant to the findings, plaintiff appealed. Affirmed.

Thos. R. Kane and *O. H. O'Neill,* for the State.

On May 1, 1902, the cars were not in transit for points beyond St. Paul. There is no evidence that on May 1 they were billed or bound for any point outside of Minnesota, or that they were ever shipped out of this state. The mere fact that on May 1 there was a possibility or even a probability that these cars would be shipped out of the state did not prevent them from acquiring a situs here for the purpose of taxation. State v. Wm. Deering & Co., 56 Minn. 24. The cars in question were not in transit, but were stored in St. Paul for an indefinite period, and were so in storage May 1, 1902, and therefore procured a situs in this state for the purpose of taxation. McCutchen v. Rice County, 2 McCrary, 337; State v. Eastabrook, 3 Nev. 173; Waggoner v. Whaley, 21 Tex. Civ. App. 1.

The defendant constantly had its cars in use in the state of Minnesota, and is therefore liable for taxes upon the average number in use during the year. American Refrigerator Transit Co. v. Hall, 174 U. S. 70. The state has the right to tax these specific cars which at a given moment were within its borders. G. S. 1894, § 1508; Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18; Adams Express Co. v. Ohio, 166 U. S. 185.

Personalty is ordinarily taxable where found. Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149; American v. Adams, 28 Colo. 119. There is no merit in the claim that the cars are instruments of interstate commerce, and therefore exempt from taxation. State v. Canda Cattle Car Co., 85 Minn. 457.

Stringer & Seymour, for respondent.

Defendant has no domicile, or place of business, or agent in Minnesota; neither has it done any business in this state. Therefore it cannot be taxed under the law in force May 1, 1902, upon its property

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having no "business situs" within this state. 1 Cooley, Taxn. 15, et seq. 270; Tappan v. Merchants' Nat. Bank, 19 Wall. 490; Goldgart v. People, 106 Ill. 25, 29; People v. Davis, 112 Ill. 272, 281.

Railway cars can be taxed only in that state where the owner has acquired a domicile. State v. Stephens, 146 Mo. 662; 2 Dillon, Mun. Corp. §§ 787, 788; City v. Illinois, 39 Iowa, 56; People v. Wemple, 138 N. Y. 1; British v. Commissioners, 31 N. Y. 32; Fargo v. Michigan, 121 U. S. 230; Dutton v. Board, 188 Ill. 386; Cooley, Const. Lim. (6th Ed.) 615. The tank cars of respondent, not being connected with any business in this state, and coming into the state for the purpose only of unloading or discharging their cargoes, or to pass through this state and into other states, have no situs in this state for the purpose of taxation. State v. Stephens, supra; Pickard v. Pullman Southern Car Co., 117 U. S. 34; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 211; Irwin v. New Orleans, 94 Ill. 105, 109; Fargo v. Michigan, 121 U. S. 230; People v. Wemple, supra; In re Union Tank Line Co., 204 Ill. 347; Kelley v. Rhoads, 188 U. S. 1.

Such cars, having no business situs within the state, are instruments of interstate commerce, and Congress alone has jurisdiction over them. To tax such cars is to regulate or interfere with interstate commerce. Section 8, article 1 (U. S.) Const.; Le Loup v. Port of Mobile, 127 U. S. 640; State v. Stephens, supra; Kelley v. Rhoads, supra; 17 Am. & Eng. Enc. (2d Ed.) 117, and notes 5 and 6.

At the time this assessment was made there was no law of this state authorizing the assessment of transient cars, such as the tank cars of this defendant. The cars did not belong to a railroad company of this state and chapter 160, Laws 1897, was unconstitutional. State v. Canda Cattle Car Co., 85 Minn. 458.

To have a situs that will warrant the assessment of personal property, such property must be permanently located in the state. Personal property that is simply passing through the state or is in the state for temporary purposes only, is not subject to assessment. 17 Am. & Eng. Enc. (2d Ed.) 115, and note 6; also 117, notes 5 and 6; State v. Scottish-American Mortgage Co., 76 Minn. 155; City of St. Paul v. Merritt, 7 Minn. 195 (258); Irwin v. New Orleans, supra; Hays v. Pacific Mail S. S. Co., 17 How. 596; People v. Pacific, 58 N. Y. 242; Reading R. Co. v. Pennsylvania, 15 Wall. 232; State v. Carrigan, 39

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N. J. L. 35; City v. Kansas City, 45 Iowa, 338; Kelley v. Rhoads, supra.

START, C. J.

This is a proceeding for the enforcement of personal property taxes for the year 1902, assessed against the defendant for personal property owned by it which was within the county of Ramsey on May 1, 1902. The defendant by its answer interposed objections to the taxes, alleging that it is a corporation organized and created by and under the laws of the state of New Jersey, having its principal place of business therein, and that the only personal property it had in the county of Ramsey on May 1, 1902, was thirty three railroad tank cars, which were then engaged in interstate commerce and in transit through the state of Minnesota. It was admitted by the state that the property assessed, and upon which the taxes were based, were thirty three railroad tank cars.

The trial court found, in effect, with other facts not here material, the following:

1. The defendant is a corporation having its domicile at Bayonne, New Jersey, and existing under the laws of that state, and is a resident and taxpayer thereof. The business of the defendant is the building, purchasing, and owning of railroad tank cars, and the letting of the same for hire to railroad companies and others, as vehicles for the transportation of liquid commodities, to points on railroads in the United States. Such cars are not leased for regular periods, routes, or trips, but are leased irregularly, as they may be applied for upon requisition to the New York office, and are not the property of any railroad company.

2. The Union Tank Line Company had no agent, office, or place of business within the state of Minnesota on May 1, 1902, or at any other time.

3. In March, 1902, the cars which are the subject of this proceeding were loaded with oil at Whiting, Indiana, and shipped and consigned as follows: Seven to Portland, Oregon; fourteen to points in the state of Washington; one to Butte, Montana; four to Winnipeg, in the province of Manitoba;

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seven to St. Paul, Minnesota. In due course of time the cars reached their respective destinations, and, having been unloaded, started back as empties on their return.

4. The seven cars loaded and billed from Whiting, Indiana, to St. Paul, Minnesota, were used for the purpose of bringing merchandise into the state of Minnesota, and did not remain here longer than necessary to be unloaded and returned in the usual course of business and of railroading. All the cars, at the time they were assessed, were engaged in and were instruments of interstate commerce, and while in St. Paul were actually in transit, and were temporarily within the state of Minnesota, and were not detained for use or in use in this state except as herein stated, and were not detained in St. Paul longer than was reasonably necessary for the purposes of unloading and transferring under the existing conditions and transferring facilities.

5. Save as hereinbefore stated, the defendant, on May 1, 1902, did not have or own any property within this state, and was not engaged in the transaction of any business therein.

The court found as a conclusion of law that the cars were not subject to taxation in this state at the time they were assessed, and that judgment be entered dismissing the proceedings. Judgment was so entered, from which the plaintiff appealed.

The state challenges the fourth subdivision of the trial court's findings of fact as not sustained by the evidence. It is true, as claimed, that the burden was upon the defendant to establish affirmatively the illegality of the assessment and tax here in question. Laws 1902, p. 38, c. 2, § 74; Dunnell, Minn. Tax Laws, § 336. It is urged on behalf of the state with earnestness and candor that the finding that the cars in question, while in St. Paul—that is, in the county of Ramsey—were actually in transit and only temporarily within the state, and were not detained for use in the state longer than was reasonably necessary for the purpose of unloading and transferring them, is unsupported by any evidence tending to prove the fact.

This question whether the finding is supported by the evidence must be determined by the rules applicable to ordinary civil actions. It is not permissible, because this is a tax case, and equitably the defendant

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ought to pay a tax for the protection of its property which it receives from the state, to disregard settled rules of law. Therefore, in this as in other cases the question is whether the evidence reasonably tends to support the findings of fact as made. Carver v. Bagley, 79 Minn. 114, 81 N. W. 757. We have attentively considered the evidence, and find that, considered as a whole, it supports the findings in question. Certain ultimate facts found by the court, which counsel for the state claims are based upon unwarranted assumptions, are fair inferences from evidentiary facts which were proven.

This brings us to the only other question in the case, namely, do the facts found by the trial court support the conclusions of law? The fact that the cars were the personal property of a nonresident is no reason why they should not be assessed for taxation in this state if they were not within the state for merely temporary purposes, for the situs of personal property is not necessarily the domicile of its owner. In re Jefferson, 35 Minn. 215, 28 N. W. 256. Nor does the fact that they were engaged in the business of interstate commerce exempt them from taxation. State v. Canda Cattle Car Co., 85 Minn. 457, 89 N. W. 66. But if they were within the state at the time of the attempted assessment only temporarily, and were not brought into the state or detained therein for use for an indefinite time, they were not taxable therein under any law of this state in force at that time, for in such case they would have no situs therein. In re Jefferson, supra; State v. Deering, 56 Minn. 24, 57 N. W. 313; State v. Scottish-American Mortgage Co., 76 Minn. 155, 78 N. W. 962, 1117; State v. Franklin Sugar Refining Co., 79 Minn. 127, 81 N. W. 752; In re Union Tank Line Co., 204 Ill. 347, 68 N. E. 504. The facts found by the trial court bring this case clearly within the rule, and its conclusions of law that the cars were not subject to taxation at the time they were assessed follow as a necessary legal conclusion from the facts found. Inasmuch as the controlling factors in the decision of this case are the facts found by the court, it is inexpedient to discuss and decide other interesting and far-reaching questions discussed in the briefs of counsel.

It is urged by the state that there is no finding that the number of cars assessed was greater than the average number habitually in or passing through the state; that the state had the right to assess for

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taxation such average number; hence the facts found do not sustain the conclusions of law. In this connection the case of American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 19 Sup. Ct. 599, is cited and relied upon. The case cited was based upon a statute of the state of Colorado. The statute in effect authorized the State Board of Equalization to ascertain the average number of cars or other items of personal property, which were constantly changing, habitually used and employed by a corporation within the state during the period for which they were assessed, and to fix the value of such average as a basis for the taxation of the corporation. The court sustained the statute and the assessment. The decision is an interesting and important one on the subject of the taxation of the cars of corporations of the class to which the defendant belongs. But it is not relevant to the case at bar, for the obvious reason that we have no statute similar to the one involved in that case. Again, the assessment here in question was not made by a state board for the entire state, but by the assessor of a local assessment district upon specific cars passing through or temporarily within the county of Ramsey.

It follows that the assessment of the cars in question was void, and that the judgment must be affirmed. So ordered.

Judgment affirmed.

W. S. McCURDY v. WALLBLOM FURNITURE & CARPET COMPANY.[1]

March 10, 1905.

Nos. 14,129—(189).

Removal of Goods Left with Bailee.

Where goods are stored in a warehouse specifically agreed upon, and are removed therefrom to another place by the bailee without notice to or knowledge by the bailor, and those goods are there destroyed by fire, the bailee is responsible to the bailor for their market value in an action of conversion, or in the nature of conversion.

[1] Reported in 102 N. W. 873.

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Implied Contract.

That parties to an agreement intend storage at a stated place, and contract with reference to storage there, and that the goods are there delivered by the bailor and stored by the bailee, amounts in law to an agreement to store at such place.

Warehouse Receipt.

In this case, *held*, that a conventional warehouse receipt specifying no particular repository was not the contract, and that the actual prior parol agreement, in connection with the dealings of the parties, shows a contract to store at a particular place.

Action in the district court for Ramsey County to recover from defendant $600 for conversion of household goods. The case was tried before Olin B. Lewis, J., and a jury, which rendered a verdict in favor of plaintiff for $350. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Philip Gilbert, for appellant.

Durment & Moore, for respondent.

JAGGARD, J.

The pleadings in this case were framed to present issues in conversion. The plaintiff and respondent took his goods to the retail furniture store of the defendant and appellant for storage. The charge was agreed upon. The defendant explained that his warehouse, in which the goods were to be stored, was situated in another part of the city. With this knowledge, the plaintiff wanted the defendant to take his goods and store them, to which the latter assented. Thereupon the plaintiff took the goods in wagons hired by himself to the warehouse aforesaid, and saw them stored therein. At the time the goods were delivered, the party who had charge of the warehouse asked the plaintiff whether he (the latter) had insurance on his goods. The reply was that he had not, but that he should take it out. Thereafter the plaintiff was given a warehouse receipt in conventional form, which provided for storage generally, but did not specify where the goods were to be kept. Subsequently the defendant changed the location of its place of business to another point in the vicinity of its original retail store, and seems to have abandoned its other establishments.

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To the new place it transferred the goods in question, where they were destroyed by fire. There was no proof that because of such removal the plaintiff lost insurance. The jury returned a verdict for the value of the goods. From an order denying a motion for a new trial, defendant appealed.

1. Where goods, which have been removed by the bailee from an agreed to another place of storage without notice to or consent of the bailor, are destroyed by fire, the bailee is liable in an action at law for the reasonable market value of the goods. Schouler, Bail. § 106. Such a state of facts makes out "a case of the defendant having taken the plaintiff's goods to a place where he had no right to take them; therefore he must pay for their loss." Stevens, J., in Lilley v. Doubleday, L. R. 7 Q. B. Div. 510, more fully reported in 44 L. T. (N. S.) 814. And see St. Losky v. Davidson, 6 Cal. 644; Lane v. Cameron, 38 Wis. 603; Pigott, Torts, 353. The bailor is entitled to the safety, to the convenience, and to any and every advantage of the agreed location. He is entitled to unchanged hazards as to things priceless to him personally, as well as to things only merchantable, and to insure or not, according to his judgment with reference to the place agreed. The bailee may not, to suit his own whim or interest, change his place of business and move the goods to a new place, and, if the goods be destroyed, refuse the bailor both his property and its value. If the rule were otherwise, how would the physical extent of the justifiable removal be determined? Would the bailee be allowed to remove the repository a mile—out of the city, out of the country? The conventional requirements of the law, as to a bailee's care, would not contain the limitations. If, as here, the bailee no longer conducts the place at which the goods were received, it would be unreasonable to require the bailor to institute search to find his belongings. The point at which the bailee would be required to deliver the goods on demand might then have to be fixed by construction.

Any other rule than that here applied would serve no useful purpose, but would easily conduce to misappropriation and fraud, put a premium on craftiness, jeopardize the property of the ordinarily prudent man, and wholly fail to afford adequate protection to the community in general.

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It is not so clear that such conduct constitutes conversion under any of the three current and similar tests of the existence of that form of legal wrong. The liability cannot be fairly based upon intention, actual or constructive, to assert title in the person having derivative possession against the person having primary possession, Innes, Torts, 198, for there is no act of dominion tantamount to the exercise, exclusion, or impairment of ownership. Nor can that liability rest securely upon asportation or detention, without authority, but with intent to convert to the use of a person other than the true owner, Fouldes v. Willoughby, 8 M. & W. 540; for, properly speaking, there is no intention to convert to the use of any person. Nor can this liability be said to fall strictly within the rule laid down as a whole by the cases, which have developed the original and narrow remedy of trover into a specific tort based on general and broadening principle of legal responsibility, viz., that the act of conversion is the distinct and unauthorized assumption of the powers of the true owner. In the leading authority on this subject, controlling the instant case, all the judges expressly evaded recognizing in such a case an instance of conversion. Lilley v. Doubleday, supra. There is in this unwillingness perhaps a mental consciousness like that of Lord Bramwell—"I am never very confident as to what is or is not conversion." National v. Rymill, 44 L. T. 767, 1 Can. L. R. 145. There is a nearly analogous class of familiar cases which are regarded as laying down the rule that appropriating an article in bailment to a different use than that agreed on is a conversion. Story, Bail. §§ 232, 233, 241, 413, 413a; Ball, Lead. Cas. Torts, 388. Thus, if a man hire a horse to ride to York, and he rides him to Carlisle, this is a conversion. Isaack v. Clark, 2 Bulst. 306; Bryant v. Wardell, 2 Exch. 479; Lee v. Atkinson, Yelv. 172; Martin v. Cuthbertson, 64 N. C. 328; Redfield, Bail. § 650. These cases, like the case at bar, involve a deviation from the agreed place and an unauthorized use. The wrong here complained of might also be regarded as an unlawful keeping. Clerk & L. Torts, 176. The most satisfactory classification of this liability is, however, to put it under the fourth class of cases in conversion as arranged by Mr. Pollock, viz., cases where there is not a conversion, but an action (formerly a special or innominate action on the case) lies to recover the actual damage. Pollock, Torts, 298.

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The measure of damages ordinarily and here is the reasonable market value of the goods destroyed. Reason and all authorities concur that the rules governing are those of conversion, and not those of a breach of contract, as laid down in Hadley v. Baxendale, 23 L. J. Exch. 179. But see 3 Smith, Lead. Cas. 456, note to Eng. Ed. 1903. There is an uncertainty whether Davis v. Garrett, 6 Bing. 716, a leading authority in this connection (Story, Bail. note to § 413a; Lilley v. Doubleday, supra), is a case in tort or on the contract; but, as to the extent of recovery, the damages usual in conversion are demonstrated therein to be proximate by unanswerable reasoning.

2. The question, whether or not, in a particular case, the agreement was general as to place of storage, or was specific, may be for the jury. In Lilley v. Doubleday, supra, the jury found for the plaintiff on this point. The court may, upon evidence, determine as a matter of law that there was no agreement to store in the particular place where the property was delivered by the owner, as in Bradley v. Cunningham, 61 Conn. 485, 23 Atl. 934, a case distinguishable, but not in a very satisfactory way, from the one under consideration. However this may be, we are of the opinion that in this case, upon its own peculiar facts, the learned trial court properly charged the jury, as a matter of law, that the bailee obligated himself to keep the goods stored in the building in which they were received, because the undisputed facts show a specific agreement to store in a designated place. That agreement was made before the issuance of the warehouse receipt, in form indefinite as to place of storage. The conversation between the bailor and the bailee, taken in connection with the delivery of the goods and all immediate subsequent transactions, prove a valid parol agreement, in which were specified, with sufficient definiteness, the parties, the consideration, the goods to be stored, and the place of storage. The name of the bailor was not expressly mentioned, but he was just as obviously a party to the contract. The place was expressly mentioned and involved in the execution of the contract, and is just as much a part of its terms as the consideration.

If an owner of exactly similar houses in a block shows a prospective lessee a particular one, the rental is agreed on, and the lessee is helped by the owner to put his household goods into that one, the owner cannot move those goods to another house equally safe and desirable,

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and escape legal responsibility by saying that no specific house was designated. The inclination of courts toward implication for the benefit of the bailor in cases like the present one is well illustrated by Davis v. Garrett, supra, where it is held that "the law does imply a duty of the owner of a vessel to proceed without unnecessary deviation in the usual and customary course," and that if, because of such deviation, the cargo is lost, the ship's owner is liable. And see Crosby v. Fitch, 12 Conn. *410.

Other assignments of error present no question calling for especial mention.

Order affirmed.

I. L. CORSE & COMPANY v. MINNESOTA GRAIN COMPANY and Others.[1]

March 10, 1905.

Nos. 14,150—(157).

False Representations.

Action to recover the consideration paid by the plaintiff to the defendant on a contract which it was induced to make by reason of the alleged false representations of the defendant.

Remedies of Person Deceived.

A party who has been induced to enter into a contract by the false representations of another may affirm the contract and sue for the damages sustained, or sue in equity for a rescission of the contract by the court, or rescind by his own act and sue for what he parted with by reason of the fraud.

Rescission.

When he seeks to rescind by his own act, he must restore or offer to restore to the other party whatever of value he received from him by virtue of the contract. In such case it is sufficient for the defrauded party to make a fair offer to return what he received, and demand what he parted with; and, if his offer and demand be refused, a strict and technical tender is not essential, but it is sufficient if proof of such offer and demand be made on the trial, with restoration in such practicable way as the court may direct.

[1] Reported in 102 N. W. 728.

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Evidence.

Rule applied, and evidence *held* sufficient to sustain a finding of the jury to the effect that the alleged representations were made and relied upon; that the plaintiff offered to restore to the defendant what it had received by the contract, and to place the defendant in statu quo; and, further, that the plaintiff did not affirm the contract, but rescinded it.

Expert Witness.

The qualification of a witness to testify as an expert is a question largely within the discretion of the trial court. The discretion was not abused in this case.

Charge to Jury.

The instructions of the trial court to the jury, taken as a whole, were free from reversible error.

Interest.

Where a party receives the money of another by mistake, without fraud, interest does not run upon it until he is put in default by a demand; but, if he obtains the money by his own fraud, he is chargeable with interest from the time of obtaining it.

Action in the district court for Hennepin county against defendants, Minnesota Grain Company, Nils O. Werner and Carl A. Werner, to rescind on the ground of fraud certain contracts and agreements entered into between plaintiff and defendant grain company, and to recover from defendants the sum of $10,000 paid by plaintiff under such contracts. Thereafter, pursuant to an order of court, plaintiff elected to proceed with the case as an action at law for the recovery of $10,000 with interest from September 8, 1902. The case was tried before Elliott, J., and a jury, which rendered a verdict in favor of plaintiff against defendant grain company for the sum demanded. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant Minnesota Grain Company appealed. Affirmed.

John Lind & A. Ueland and *Cohen, Atwater & Shaw,* for appellant.

This action, being for the recovery of the consideration paid by plaintiff, cannot be maintained, because plaintiff has not complied with the conditions precedent to such an action. Gould v. Cayuga, 86 N. Y. 75, 84; Vail v. Reynolds, 118 N. Y. 297; Gifford v. Carvill, 29 Cal. 589; Luddington v. Patton, 111 Wis. 208; Bostwick v. Mutual, 116

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Wis. 392; 1 Beach, Eq. Jur. § 67; Knappen v. Freeman, 47 Minn. 491; Nelson v. Carlson, 54 Minn. 90. In an action at law proceeding on a previous rescission, an actual profert of the money or things to be returned is essential as a condition precedent to the cause of action. Buchenau v. Horney, 12 Ill. 336; Holmes v. Holmes, 12 Barb, 137, 144; Pearsoll v. Chapin, 44 Pa. St. 9; Beetem v. Burkholder, 69 Pa. St. 249; Tisdale v. Buckmore, 33 Me. 461, 463; Wilbur v. Flood, 16 Mich. 40, 45; Byard v. Holms, 33 N. J. L. 119; Bostwick v. Mutual, supra. Plaintiff failed to proffer before suit either a reassignment of the mortgages and other securities or a return of the other property and rights received from the defendant. Hunt, Tend. § 234; Pinney v. Jorgenson, 27 Minn. 26; Deering Harvester Co. v. Hamilton, 80 Minn. 162. The notice does not offer a reconveyance, but simply a "return" of the specified securities and other documents. This is not a rescission. Ahrens v. Adler, 33 Cal. 608; Jeffers v. Forbes, 28 Kan. 174. Defendant's answer denying the tender and the offer alleged in the complaint did not waive the performance by plaintiff of the conditions precedent to the action. Plano Mnfg. Co. v. Northern Pac. Ele. Co., 51 Minn. 167; Jumiska v. Andrews, 87 Minn. 515; Luddington v. Patton, supra; Peoples v. Crosby, 57 Neb. 282; Parr v. Johnson, 37 Minn. 457; Dunn v. Hunt, 63 Minn. 484; La Plant v. Firemen's Ins. Co., 68 Minn. 82.

Plaintiff did not offer to put the defendant in statu quo and was in fact unable to do so except in a court of equity. That it was not entitled to interest is clear. Interest by way of damages is allowed only on account of some default. Schrepfer v. Rockford Ins. Co., 77 Minn. 291.

Plaintiff affirmed the contract by its conduct. Parsons v. McKinley, 56 Minn. 464; Grymes v. Sanders, 93 U. S. 55.

The alleged representations gave the plaintiff no right to rescind. To make a contract voidable, the misrepresentation must, of course, be acted upon by the party to whom it is made. 2 Pomeroy, Eq. Jur. § 893. There is nothing in the record to support a claim that Carl A. Werner had any authority, real or apparent, as respects the disposition of the account and securities in question. Browning v. Hinkle, 48 Minn. 544; Whitney v. Wagener, 84 Minn. 211.

There was error in permitting the jury to find for the plaintiff on Hogan's misrepresentations, because in fact there was no conspiracy

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and no authority on his part to make any representations. Nicolay v. Mallery, 62 Minn. 119.

There was error in permitting the jury to find for plaintiff on account of the alleged representations made by Carl Werner, because there was no conspiracy and no authority on his part, and because if this were not so, the charge is in the disjunctive at several points, permitting the jury to find a verdict for the plaintiff if they believed that Carl Werner had made even a trivial and nonactionable statement. Browning v. Hinkle, supra; Whitney v. Wagener, supra; Cook, Stockh. § 726.

There was error in permitting a verdict for interest from September 8, 1902, because no cause of action had then accrued, and defendant was not in default. Schrepfer v. Rockford Ins. Co., supra.

W. S. Dwinnell and *V. J. Welch*, for respondent.

START, C. J.

Action to recover the sum of $10,000 paid by the plaintiff to the defendant for an assignment of an account for that amount due by a third party to the defendant. The complaint alleged in effect that September 8, 1902, the plaintiff was induced by the false representations of the defendant, upon which it relied, to purchase an account, with the securities collateral thereto, which the defendant had against Annie G. Hogan, and to pay the defendant therefor the sum of $10,000, and to take assignments and transfers of the account and the collateral securities from the defendant; that the representations which related to the solvency of the debtor and the value of the securities were untrue, to the knowledge of the defendant; and, further, that the plaintiff had no knowledge of the falsity of such representations until shortly before the commencement of this action, when it duly offered and tendered to the defendant the return of the account and securities, and demanded the repayment of the consideration given therefor. The complaint demanded judgment that, upon the delivery to the defendant of the account and securities, the contract between the parties be rescinded, and that the plaintiff recover the sum paid to the defendant, with interest.

The answer denied all of the allegations of fraud in the complaint, and those relating to the offer to return the account and securities, and alleged, in effect, that the plaintiff purchased the account and securities

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on its own investigations as to the solvency of the debtor and the value of the securities; that it affirmed the contract of sale before the commencement of this action. The answer alleged other facts not here necessary to be specifically referred to. The reply confessed and avoided or denied the allegations of new matter alleged in the answer.

The cause was placed by the plaintiff on the jury calendar of the district court for trial at the January, 1904, term of the court. The plaintiff, on motion of the defendant, was required to elect whether it would proceed with the case as an action at law, or one in equity for rescission. The plaintiff thereupon elected to treat the cause as an action at law for the recovery of the consideration paid, and by consent of both parties the prayer of the complaint for judgment was amended accordingly. The jury returned a verdict in favor of the plaintiff for $10,000, and interest from September 8, 1902. The defendant appealed from an order denying its motion for judgment notwithstanding the verdict or for a new trial.

1. The defendant's claims, as to the facts, are, briefly stated, that there was no evidence to sustain a finding by the jury that the plaintiff rescinded the contract before the commencement of the action, in that there was no proffer of a reassignment of the account and collateral securities, or offer or ability to put the defendant in statu quo; that the plaintiff did not rely upon the alleged false representations, but acted upon its own investigation; and, further, that it affirmed the contract by its conduct.

A party who has been induced to enter into a contract by the false and fraudulent representations of another has, as a general rule, three remedies: He may affirm the contract by keeping what he received under it, and bring an action for the damages he has sustained by reason of the fraud; or he may sue in equity for a rescission of the contract by the court, and recover what he parted with, upon such conditions as the court may deem to be equitable; or he may rescind by his own act, and sue at law for what he parted with by reason of the fraud. When he sues in equity to rescind, it is not necessary that he should have previously attempted a rescission, or made any offer to return what he received, for what he ought to do and must do, as a condition of the rescission, is a question which the court will determine. When, however, he seeks to rescind by his own act, he must give to the other party

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notice of his rescission, and restore or offer to restore to him whatever of value he received from him by reason of the contract. Thus far there is no controversy as to the law, for the general rules we have stated are elementary. Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533; Nelson v. Carlson, 54 Minn. 90, 55 N. W. 821; Mlnazek v. Libera, 83 Minn. 288, 86 N. W. 100; 9 Cyc. 432.

The difficulty, however, lies in the application of the rule that, where a party seeks to rescind by his own act, he must offer to return what he received under the contract. Must he in such a case, under all circumstances, make a strict and rigid tender of the things received? Some of the earlier cases answered the question in the affirmative, and enforced the rule with much strictness, which resulted in many cases in shielding the party guilty of the fraud. The trend of later cases is in favor of a more reasonable and equitable application of the rule. The party guilty of the fraud is not entitled to anything more than substantial justice, and a fair opportunity to receive what he parted with. Nor is he in a position to defeat the ends of justice by insisting upon a strict, but useless, tender, as a condition precedent to the exercise by the defrauded party of his right to rescind. We hold, upon principle and authority, that it is only necessary for the defrauded party in such cases to make a fair offer to return what he received under the contract, and demand what he parted with; and, if his offer and demand be refused, it is sufficient if he makes proof thereof at the trial, and restoration in such practicable way as the court may direct. Potter v. Taggart, 54 Wis. 395, 11 N. W. 678; Bell v. Anderson, 74 Wis. 638, 43 N. W. 666; Bostwick v. Mutual, 116 Wis. 392, 89 N. W. 538, 92 N. W. 246; Sisson v. Hill, 18 R. I. 212, 26 Atl. 196.

The evidence shows in this case that approximately one year after the making of the contract, and on September 5, 1903, the plaintiff sent a letter signed by it to the defendant, which was in these words:

> September 5, 1903. The undersigned I. L. Corse & Company, does hereby tender to you, and to each of you, a return to the Minnesota Grain Company of each, all and singular, the securities, evidences of indebtedness, accounts, claims and demands whatsoever, assigned by said Minnesota Grain Company to the undersigned, in consideration of the sum of $10,000 paid by

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the undersigned to said Minnesota Grain Company on or about September 8, 1902, on the said Minnesota Grain Company against Annie G. Hogan, assigned by the said Minnesota Grain Company to the undersigned, and hereby demands from you, and each of you, the repayment to the undersigned of said sum of $10,000 together with interest thereon from and since September 8, 1902.

The evidence tends to show that this letter was sent shortly after the plaintiff discovered the alleged fraud, and that the defendant received it the next day, but made no reply thereto, or in any manner indicated its acquiescence in the proposed rescission of the contract, or its willingness to receive back what it gave to the plaintiff under the contract, and, further, that it would have been an idle ceremony for the plaintiff to have followed the offer contained in its letter with any other or further tender.

The action was commenced October 5, 1903. On the trial of the action the plaintiff made a tender, as it claims, of the account against Hogan, and all collateral securities, with proper assignments thereof, which the defendant refused to accept, and they were deposited for it with the court. It is urged on behalf of the defendant that there was no offer to reassign the securities and place the defendant in statu quo. A tender to the defendant of the return of all of the accounts and securities necessarily included an offer to do everything necessary to revest them in the defendant, if the offer was accepted. The demand of interest did not vitiate the offer. We are of the opinion that the evidence is sufficient, within the rule we have stated, to sustain a finding by the jury to the effect that the plaintiff did, before the commencement of the action, offer to restore what it received under the contract, and to place it in statu quo, and that it demanded the amount paid by it by virtue thereof.

The evidence upon the other issues is voluminous and conflicting as to some of them—especially on the question whether the alleged false representations were made and relied upon by the plaintiff. We have, however, aided by the clear and full briefs of counsel, carefully considered the evidence with reference to the claims of the respective parties, and have reached the conclusion that the evidence is sufficient

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to support a finding of the jury to the effect that the alleged false representations were made by the defendant, and relied and acted upon by the plaintiff; that it did not affirm the contract, but rescinded it within a reasonable time after discovering the alleged fraud.

2. The rulings of the trial court on the admission of evidence in two instances are urged as error. The plaintiff called Carl A. Werner, who was at the time he was called an adverse party defendant, for cross-examination under the statute, G. S. 1894, § 5659; and, over the objection of the defendant grain company, he was so examined. The witness at the time of the transactions alleged in the pleadings was the treasurer and secretary of the defendant. The witness was not, however, an officer of the defendant, but only a stockholder, at the time he was called. The defendant grain company objected to the cross-examination of the witness because the complaint did not state a cause of action against him, hence he was only a nominal party, and, further, that no foundation had been laid for calling him as an officer or agent of the corporation defendant. Without passing upon the last objection, we hold that the witness was properly called for cross-examination as an adverse party of record. The defendants, including the witness, jointly answered, and put in issue the allegations of the complaint. The pleadings brought the witness directly within the statute, and the objection that the complaint did not state a cause of action as to the witness could not be then urged to defeat the plaintiff's right to call him. The fact that a verdict was, with the consent of the plaintiff, directed for all of the defendants except the grain company, does not affect this conclusion.

The other ruling of which the defendant complains relates to the competency of a witness to testify to the value of the securities in question, the trial court holding him to be competent. The qualification of a witness to testify as an expert is a question largely within the discretion of the trial court, whose decision will not be reversed unless it is manifestly against the weight of the evidence. The discretion was not abused in this case. Yorks v. Mooberg, 84 Minn. 502, 87 N. W. 1115.

3. The defendant urges a number of assignments of error as to the instructions of the trial court to the jury. The court, at the request of the plaintiff, instructed the jury to the effect that the question whether

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the alleged false representations were made was the vital and substantial issue in the case; that if the jury found that the president of the company, Nils O. Werner, its secretary, Carl A. Werner, and Hogan, the agent of the defendants' debtor, entered into a conspiracy or fraudulent agreement, by the terms of which they were to make the alleged false representations for the purpose of inducing the plaintiff to take over the Hogan account, and, further, that they, or any one of them, pursuant to such agreement, did make such false representations, or one or more of them, to the plaintiff, knowing them to be false, and thereby induced him to take over the account, the verdict must be for the plaintiff. Several different requests stating in different language substantially this instruction were given in succession to the jury. It is claimed that the instructions were erroneous and prejudicial because there was no evidence which would justify the jury in finding the existence of any conspiracy or fraudulent agreement whereby the plaintiff was to be induced to take over the account. The evidence tending to show a conspiracy was radically conflicting, the defendant's president and secretary each denying that any false representations were made, or that there was any understanding or agreement that any should be made. There was, however, evidence, direct and circumstantial, tending to establish the alleged conspiracy, which was sufficient to justify the giving of the instructions.

The further objection is made to the instructions that they exclude from the consideration of the jury the matter of the rescission and affirmance of the contract. The evidence made this matter a question of fact for the jury, and, standing alone, the instructions were for this reason erroneous. The court, however, immediately after giving the requests, clearly and correctly instructed the jury as to the other issues in the case. The jury were told, in effect, that, if they found that the representations were not made, it would dispose of the case, and their verdict would be for the defendant, but, if they were made, then the jury should proceed to determine certain other matters. This was followed by full and fair instructions as to whether the contract was rescinded or affirmed by the defendant. The court concluded its charge with a correct summary of all the essential elements of the case, in which the representations and the rescission or affirmance of the contract were grouped in a manner that makes it clear that the jury

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could not have been misled by the giving of the incomplete requests of the plaintiff. The charge of the court, considered as a whole, was free from reversible error.

4. The last claim of the defendant meriting consideration relates to the matter of interest. There was included in the verdict by direction of the court, in case the jury found for the plaintiff, interest from September 8, 1902, the date the money was received by the defendant. The contention of the defendant is that in no event was the plaintiff entitled to interest before the demand, September 5, 1903. This is not an action to recover damages, but to recover money which the defendant, by reason of the alleged fraud, has, as the jury found, no right to. The rule as to the interest in such cases is well settled. It is this: Where a party receives the money of another by mistake, merely, without fraud, interest does not run upon it until he is put in default by demand; but, where the party obtains the money by his own fraud, he is chargeable with interest from the time of obtaining it. Sibley v. County of Pine, 31 Minn. 201, 17 N. W. 337; Atlantic v. Harris, 118 Mass. 147; Manufacturers v. Perry, 144 Mass. 313, 11 N. E. 81. Interest from the time the defendant received the money was rightly included in the verdict.

Order affirmed.

PETER MILLER and Another v. J. C. DAYTON and Another.[1]

March 10, 1905.

Nos. 14,152—(192).

Gratuitous Bailment.

Appellants gratuitously acted as custodians of funds for respondents, and disbursed the same upon the order of their representative, who had full charge of the business in that locality. After the business had been carried on for about two years, plaintiffs served the following notice on appellants: "To Dayton & Nepstad. Don't pay any money out except for stock. Miller Bros. Dated 1—15th."

Held: Under the circumstances developed by the evidence appellants did not, as a matter of law, violate the terms of the notice in cashing

[1] Reported in 102 N. W. 862.

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certain checks issued by respondents' representative to reimburse himself and another for money advanced and borrowed for use in carrying on the business. The question should have been submitted to the jury, and it was error to direct a verdict for respondents.

Action in the district court for Fillmore county to recover from defendants $240.60, being a balance of money on deposit. The defendants, answering, alleged that the money had been paid out by them upon the order of plaintiffs' agent pursuant to plaintiffs' instructions. The case was tried before Kingsley, J., who directed a verdict in favor of plaintiffs for the sum demanded. From an order denying a motion for a new trial, defendants appealed. Reversed.

Wells & Hopp, for appellants.

George W. Rockwell and *Gray & Thompson,* for respondents.

LEWIS, J.

Plaintiffs were copartners engaged in the business of buying and shipping stock at Rushford, Minnesota, and from 1901 to about the middle of May, 1903, one Frickson, of Peterson, Minnesota, was interested with them under an arrangement whereby plaintiffs were to furnish the capital and the three to divide profits and losses. Defendants were general merchants at Peterson, and acted as gratuitous custodians of the money. In the conduct of business the custom was for Frickson to issue checks upon defendants, who cashed them out of the funds furnished by plaintiffs. Quite a large amount of business seems to have been transacted, and considerable money was placed upon deposit from time to time. January 15, 1903, for some reason which does not appear, plaintiffs served the following notice on defendants: "To Dayton & Nepstad. Don't pay any money out except for stock. Miller Bros. Dated 1—15th." Subsequently to this date, and about May 1, 1903, defendants cashed a check issued by Frickson to a Mr. Bartlett for $150, and another for $100, issued by Frickson payable to himself. During the month of May, 1903, a settlement was had between the parties, and these items were disallowed by plaintiffs upon the ground that they had been paid out contrary to the terms of the notice, and this action was brought to recover the amount of those checks, less the sum of $9.40, which was allowed. The defense interposed was that checks, although upon their face appearing to have been paid for cash, were in fact paid

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out for stock. At the close of the testimony the court directed a verdict for plaintiffs for the full amount, with interest.

The appeal requires us to determine whether or not there was any evidence reasonably tending to support defendants' claim that the money paid out upon the two checks was not paid contrary to the terms of the notice. As to the $150 item, according to the testimony of Frickson, on or about April 1, 1903, he either purchased or made a contract for the purchase of stock from certain persons (Randall and Boyem); that there was no money on deposit with defendants at that time, and for the purpose of meeting these purchases he made a temporary loan of $150 from Bartlett, out of which $70 was paid on the Randall account and $81.90 on the Boyem account. At the time of borrowing this $150 Frickson gave his check for that amount upon defendants, and when Bartlett presented it for payment he was told by defendants that they had notice from plaintiffs not to pay out any money except for stock. Bartlett replied that the money borrowed was for the purchase of stock. It was known to defendants that the check issued to Bartlett was not in payment of stock sold by him, and it may fairly be inferred from what was said and done that defendants knew the money advanced by Bartlett was for the purpose of purchasing stock. If, in the course of business, Frickson made contracts for the purchase of stock from Randall and Boyem, and, there being no money on deposit with defendants to meet the purchase, he made a temporary loan from Bartlett to be used in the business, which was so used, and defendants thereafter, being informed of the situation, reimbursed Bartlett for the money so advanced, such payment by them was not, as a matter of law, contrary to the terms of the notice.

So far as the $100 check is concerned, the evidence of Frickson was to the effect that about March 30, there being no money on hand, he paid defendants $80 out of his own money, and later the further sum of $9.40, in the purchase of stock, for which he afterwards issued a check upon defendants, payable to himself. It does not distinctly appear whether defendants knew that the $9.40 was paid out for stock by Frickson, but they did know he deposited $90 with them for the purpose of furnishing money to carry on the business. True, this money may have been received by Frickson from plaintiffs, or from sale of stock. If so, it tends to show that plaintiffs, after January 15, in a general way

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intrusted the transaction of their business to Frickson, and, if it was true that in the conduct of such business the money was advanced by Frickson himself for the purpose of meeting expenses and paying for stock, and defendants issued their check for $100 to reimburse him, then it does not follow, as a matter of law, that in so doing they violated the terms of the notice. Defendants were acting without compensation as disbursing agents for plaintiffs. The business had been conducted for more than two years, and apparently a large volume of business had been carried on. Occasionally they had paid money directly to Frickson himself. It does not appear there was any limitation upon the authority of Frickson as to his method of transacting business, or that he was to disburse money entirely by check.

Under such circumstances defendants were only required to use ordinary care and act in good faith to see that the money intrusted to their custody was applied to the proper purposes. The notice should be construed with reference to the character of the business, the length of time it had been carried on, and the apparent authority with which plaintiffs had vested Frickson. Strictly construed, perhaps, defendants would be required to pay no money except to an actual seller of stock, but, in view of all of the circumstances of the case, we are of the opinion that plaintiffs are not entitled to hold defendants to so strict an account.

This conclusion is not changed by the fact that subsequently plaintiffs gave Frickson credit for the same items. The question turns upon the position occupied by defendants at the time they paid the checks. The notice in question had been served two months and a half prior. The parties resided only five miles apart, and plaintiffs had at their command the facility of ascertaining the true condition of account as between themselves and their representative Frickson. If the conduct of the business permitted by them was such as would lead defendants reasonably to assume that all that was required by the notice was to see that the money paid out by them was used in the business, then they might be justified in reimbursing the parties who temporarily advanced money for the business. There is no evidence to indicate bad faith, and it is at least debatable whether, under all of the conditions, the notice was sufficiently specific to notify defendants that it was the purpose of plaintiffs absolutely to prevent Frickson from borrowing money, or in any way handling the cash.

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We have arrived at the conclusion that the court was not justified in directing a verdict, and should have submitted to the jury the question of fact whether or not in paying the checks in question defendants were violating the terms of the notice.

Order reversed.

E. C. M. RAND v. RUSSELL SAGE.[1]

March 10, 1905.

Nos. 14,180—(190).

Evidence.

Plaintiff having testified that defendant owed him for services earned at a date prior to his adjudication as a bankrupt, it was proper to receive in evidence, as a part of the cross-examination, the schedules of property filed by him in bankruptcy proceedings for the purpose of testing plaintiff's credibility as a witness.

Bankruptcy—Title to Property.

Upon the adjudication of a bankrupt, title to his property passes from him at once, and is conditionally vested in the court, pending the appointment of a trustee, or until the estate is finally closed or abandoned by the creditors. It having been shown that plaintiff was adjudged a bankrupt, that the claim sued upon had not been scheduled by him in such proceedings, that no trustee in bankruptcy had been appointed by the creditors, and that the bankrupt had been discharged, but it not appearing whether the court had subsequently exercised jurisdiction over the estate, nor whether the estate had been duly closed or abandoned by the creditors, such facts did not, as a matter of law, operate to revest title in plaintiff.

Request to Charge Jury.

It was error to refuse to instruct the jury that plaintiff could not recover for that part of his claim earned prior to the date of adjudication in bankruptcy. It was not error to refuse entry of judgment for defendant notwithstanding the verdict.

Action in the district court for Ramsey county against defendant, as assignee in trust of Hastings & Dakota Railway Company, to recover

[1] Reported in 102 N. W. 864.

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$15,000 for services rendered. The case was tried before Olin B. Lewis, J., and a jury, which rendered a verdict in favor of plaintiff for $7,500. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed and new trial granted.

Owen Morris and *John D. O'Brien,* for appellant.

Davis, Kellogg & Severance, for respondent.

LEWIS, J.

Plaintiff seeks to recover in this action the reasonable value of services claimed to have been performed by him for defendant under and pursuant to a certain verbal agreement. The complaint alleged that defendant Russell Sage, of New York City, was the assignee in trust of the Hastings & Dakota Railway Company; and that by the terms of the instrument of trust certain lands belonging to the railway company were conveyed to him in trust, with authority and power to sell, handle, and manage the same, and to employ sufficient assistance to enable him so to do; that on or about September, 1897, plaintiff was engaged by defendant to take charge of and perform services in relation to these lands, which employment he accepted, and performed services from September, 1897, until September, 1902; that the amount of land involved was about two hundred thousand acres; and that his services included the charge of general litigation in connection therewith, and the listing, appraisement, and sale thereof, and the value of services so rendered was claimed to be $15,000.

The answer admitted transfer of the lands to defendant Sage, in trust, with power to sell and lease the same, and to reimburse himself in certain sums, and thereafter to divide the money among the stockholders of the Minnesota Railway Construction Company; that in January, 1895, at New York City, defendant, in his individual capacity, but not as trustee, employed plaintiff to perform duties concerning defendant's individual business at the stated compensation of $100 per month, which, about January 1, 1901, was increased to $200, and continued at that until September 1, 1902, when the arrangement was terminated, and alleged that plaintiff had been paid in full. Employment by defendant, as trustee, of plaintiff, was specifically denied, and it was alleged that whatever services plaintiff may have performed in relation

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to the lands referred to were done for defendant personally, and covered by his salary.

For reply to this answer plaintiff admitted that he had been employed by defendant in an individual capacity, but that the services alleged in the complaint to have been rendered were additional ones, performed for defendant as trustee, under a separate and different agreement. The trial resulted in a verdict for plaintiff for $7,500.

1. Upon direct examination plaintiff testified that he first commenced to work for Sage in the city of New York, in 1895, under a verbal contract of $100 per month, which is stated by the witness as follows:

> The substance of the conversation was that I was to receive $100 a month for attending to his personal matters; that is, matters in which he was wholly interested. For matters that were known as outside matters, in which others were interested, I was to receive a fair compensation.

The witness testified that under this arrangement he went to work in 1895, and continued until September 1, 1902; that he had a conversation with Sage in September, 1898, as follows:

> Mr. Sage called my attention to what was known as the land matters (in the way of conversation) in Minnesota, and stated that he would like to have me go up there, and look after them, or look into them, and see what could be done—take any steps that were necessary for the benefit of those lands. And I stated to him, "This, Mr. Sage, will be an outside matter." He says, "Yes." And I said, "I receive special compensation for it, because other parties are interested in these lands with you."

The witness then stated, with more or less detail, the nature of the business transacted by him for defendant, and his testimony was that he was performing services for Sage in connection with other matters not of a personal nature, in which Sage was interested with other parties, and for which he was allowed extra compensation. With reference to his services in connection with the lands in question, the witness stated the number of trips he made to St. Paul, and the character of work done in the way of listing, advertising, and looking after litigation concerning the lands.

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Defendant attacks the sufficiency of plaintiff's testimony with great vigor, and insists that it is overwhelmed by the array of evidence offered on the part of defendant to show that under the system arranged for the care and disposition of the lands plaintiff had no part; that special agents were employed at St. Paul, having entire charge of the advertising and sale of the lands, and that counsel was employed to look after the litigation; and whatever plaintiff did in connection therewith was of a purely incidental nature, and voluntarily performed for defendant under his personal contract with him. We have examined the record with the view of determining whether the evidence offered by defendant was of such convincing character as to justify the conclusion claimed for it, but are unable to meet the views of defendant in this respect. It is practically admitted by defendant that certain services were rendered by plaintiff in relation to the lands in question; that such services extend over a period of years, and had to do, more or less, with the examination of the lands as well as with litigation concerning them; and on the whole record we think it was a question of fact for the jury to determine wherein the right was.

2. Defendant insists that from the substance of the conversation which is claimed by plaintiff to constitute a contract, and which has already been recited, it conclusively appears that whatever contract was made was with defendant in his individual capacity, and not as trustee. This position is not well taken. It is admitted that Sage was in fact the trustee, and had in his personal charge the lands referred to, with authority to dispose of them and account for the proceeds. If defendant was authorized to execute the trust and incur the necessary expense for that purpose, he had authority to employ plaintiff to assist in accomplishing that purpose; and it follows that, if Sage entered into the arrangement with plaintiff to compensate him for services connected with the trust, the contractual relation thus established was between plaintiff and defendant as trustee, and not in his individual capacity.

3. It developed upon cross-examination of plaintiff that in the spring of 1899 he went into bankruptcy, and as a part of the cross-examination defendant offered in evidence the petition and schedules in bankruptcy, which were objected to upon the ground that they were immaterial under the pleadings. But they were clearly competent for the purpose of testing the credibility of the witness, and we need not decide whether

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the objection was specific enough to raise the question that they were incompetent under the pleadings for the purpose of showing that plaintiff was not the proper person in interest as to that portion of the claim alleged to have been earned prior to the adjudication in bankruptcy. It was shown without objection that plaintiff was adjudged a bankrupt in the spring of 1899, and, such being the case, it was immaterial whether the schedules were properly received or not. As we view the case, it having appeared without objection that plaintiff was adjudicated a bankrupt, it follows as a matter of law that the title to the property in question passed from plaintiff for the benefit of his creditors. Conceding, then, that the creditors took no action at the first meeting towards the appointment of a trustee, and that no trustee ever was appointed, the question presented is whether title to the claim against Sage passed from plaintiff upon his adjudication as a bankrupt, and, if so, whether the title revested in plaintiff, in absence of proof that the estate was regularly closed, or that the property was not required by the creditors.

Section 55, Bank. Act July 1, 1898, c. 541 (30 St. 559 [U. S. Comp. St. 1901, 3442]) provides that the court shall cause the first meeting of creditors to be held not less than ten nor more than thirty days after the adjudication, and section 44 (30 St. 557 [U. S. Comp. St. 1901, 3438], that the creditors shall, at their first meeting after the adjudication, appoint a trustee or trustees for the estate, and, if none is appointed, then the court shall do so. Section 2 (30 St. 545 [U. S. Comp. St. 1901, 3420]) covers the question of jurisdiction of the courts in a bankruptcy proceeding; defines their powers, among which the appointment of receivers, or marshals, upon application of the parties in interest, in case of necessity for the preservation of estates; to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or a trustee is qualified; and to take such orders, issue such process, and enter such judgments in addition to those specifically provided as may be necessary for the enforcement of the provisions of the act. Section 70 (30 St. 565 [U. S. Comp. St. 1901, 3451]) provides that the trustee, upon his appointment and qualification, shall, by operation of law, be vested with the title of the bankrupt as of the date he was adjudged a bankrupt, except as to exempt property, in the various classes of property enumerated. In subdivision "d" it is provided that when a composition shall be set aside, or a discharge revoked, the trustee shall, upon his

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appointment and qualification, be vested with title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge: subdivision "f," that upon the confirmation of a composition offered by a bankrupt the title to his property shall thereupon revest in him.

Considering all of these provisions, and giving each due force, the conclusion is unavoidable that it was the legislative intent to divest the petitioner of the title to his property upon being adjudged a bankrupt. While the full legal title and control of the property does not pass to the trustee until one is appointed and qualified, yet if the creditors do not, for any reason, act within the time limited, the power is expressly conferred upon the court to appoint such trustee, and, if necessary, in the meantime, to take possession of the property and exercise dominion and control over it for the benefit of the creditors through the medium of a receiver specially appointed, or the marshal of the court. These powers would not have been granted if it had been the intention to deprive the court of dominion over or jurisdiction of the estate pending the time a trustee might be appointed. Title remaining in the bankrupt is inconsistent with control of the estate by the court. There must be either one thing or the other. The bankrupt retains title to his property, with power to exercise dominion over it, to transfer and incumber it, or the title passes conditionally to the court for the benefit of the creditors until a trustee is appointed or the estate is closed. The latter is the only rational view consistent with the provisions of the act.

Conceding that title passed, and the property of the bankrupt remained suspended or vested in the court for the benefit of the creditors, another question arises under the facts of this case: In the absence of any evidence, is it to be inferred that the creditors have abandoned the estate, and, the court not having been called upon to exercise its jurisdiction, that title revested in plaintiff. We are not prepared to deny that the creditors may so act with relation to the estate of a bankrupt that they would be held to have abandoned all claim to his property, but are not of the opinion that the facts presented in this case justify such conclusion. All that appears is that no action was taken at the time, and as to what transpired thereafter the record is silent. It is conceded that the claim was not scheduled. Being a valid asset, it should have been scheduled, and the creditors put in possession of the facts concern-

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ing it. The result of not having done so was probably to keep the creditors in the dark as to the existence of such a claim. Such being the case, the court will indulge in no presumption to the effect that the creditors thereafter exhausted their resources, and, having failed to recover any property, abandoned the whole matter. Upon proof of adjudication in bankruptcy, the presumption arose that plaintiff's whole estate was subjected to the dominion of the court for the benefit of his creditors. The burden then shifted to plaintiff to show either that his estate was closed in the regular manner, and that the claim in question came back to him, or he was required to prove that the creditors had, with knowledge of the facts, abandoned the whole proceeding, so that the title revested in him.

The discharge in bankruptcy did not affect the question of title to the property belonging to the bankrupt at the time of the adjudication. The administration of the estate may proceed without regard to the date of the discharge. Section 15 of the act, (30 St. 550 [U. S. Comp. St. 1901, 3428]), which provides for the revocation of a discharge upon certain conditions, has no bearing upon the title of property belonging to the estate, and which should have been scheduled.

In our opinion, it appears as a matter of law from the facts adduced in evidence that the entire estate of the bankrupt had been subjected to the jurisdiction of the court, and that the title thereto had not revested in the plaintiff. Upon this point we have had the benefit of a decision upon the same question in a similar case, rendered by the supreme court of New York, Appellate Division, in June, 1904—Rand (this plaintiff) v. Iowa, 89 N. Y. Supp. 212—and we agree with the conclusions reached by that court. The case of King v. Remington, 36 Minn. 15, 29 N. W. 352, has no application, the facts there involved being entirely different. While the language of the act of 1898 is somewhat different than that embraced in the acts of 1841 and 1867, yet the spirit of the law is the same, and the decisions rendered under those acts are in harmony with the result we have reached.

For the reasons stated, defendant was entitled to have submitted to the jury the request that plaintiff could in no event recover for services performed prior to March 3, 1899.

Order reversed and new trial granted.

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ST. PAUL TYPOTHETÆ and Another v. ST. PAUL BOOKBINDERS' UNION NO. 37 and Others.[1]

March 10, 1905.

Nos. 14,186—(126).

Party to Action.

To be entitled to recognition in the courts of this state, a party must, in the absence of statutory provisions to the contrary, be either a natural or artificial person.

Unincorporated Association.

Voluntary unincorporated associations, not engaged in some business enterprise, can neither sue nor be sued in their association name. Actions in which such associations are involved must be brought in the names of the members.

Statute Construed.

G. S. 1894, § 5177, construed, and *held* to apply to business associations, and to authorize an action against, but not by, such associations in their common name.

Plaintiff's Capacity to Sue.

The St. Paul Typothetæ is an unincorporated association of persons, firms, and corporations engaged in the printing and bookbinding trade. The association is not engaged in such business, nor is it an employer of labor. The sole purpose and object of its organization is the promotion of the interests of its members in the matter of employment of workmen, and entering into, as their representative and in their behalf, contracts with their employees. It is *held* that it has no legal capacity to sue, and cannot maintain an action for a breach of a contract made by it on behalf of its members with their employees.

Defendant's Capacity to Be Sued.

The St. Paul Bookbinders' Union No. 37, is an unincorporated association of employees organized for purposes similar to those of the Typothetæ. It is not a business concern; the members are laborers in the printing and bookbinding business, but do not labor for the association, but for themselves, and the sole object and purpose of the association is the promotion of the interests and welfare of its members. It is *held* that it is not, within the meaning of section 5177, G. S. 1894, a business association, and cannot be sued in its association name. The members thereof are liable for a breach of a contract made for them by the association,

[1] Reported in 102 N. W. 725.

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if liable at all, on the law of principal and agent, and must be proceeded against individually.

Point not Decided.

Whether the complaint states a cause of action against the individual members of the union in favor of the West Publishing Company, is not presented and not decided.

Cross appeals by plaintiffs and defendants from orders of the district court for Ramsey county, Orr, J., sustaining a demurrer to the complaint as to plaintiff West Publishing Company, and overruling a demurrer to the complaint as to plaintiff St. Paul Typothetæ. Order sustaining demurrer as to West Publishing Company affirmed; order overruling demurrer as to St. Paul Typothetæ reversed.

Stringer & Seymour, for plaintiffs.

It is conceded by the demurrers that a cause of action is stated against the individual members of the union, for the individual members did not demur for themselves, but upon the ground that a cause of action is not stated against the union. The demurrers are based on the second, fourth and sixth subdivisions of the statute. A demurrer upon the second provision of the statute will not lie unless it affirmatively appears from the complaint that plaintiff has not legal capacity to sue. State v. Torinus, 22 Minn. 272; Minneapolis Harvester Works v. Libby, 24 Minn. 327. Not only does it not affirmatively appear from the complaint that plaintiff has not legal capacity to sue, but it affirmatively appears that plaintiff has such capacity. The Typothetæ is an organization or unincorporated association of individuals, firms and persons, associated for a lawful purpose and for the transaction of business in which each and all of its members are interested. For their mutual interest a contract is made. This contract is violated by the defendants and this action is based on the breach of said contract. We are unable to conjecture on what grounds it can be urged that the Typothetæ has not legal capacity to sue; that is, that it has not authority to make a contract as entered into between it and the defendants. Whether or not the contract is enforceable, whether it is valid or void and whether the complaint states a cause of action or not, does not affect the legal capacity of the Typothetæ to bring this action. If the

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Typothetæ is a myth, as counsel suggests, then every copartnership in which the full names of the copartners do not appear is a myth and has no legal capacity to sue.

The second alleged ground of demurrer is that there is a defect of parties plaintiff. But the statute does not make this a ground of demurrer. G. S. 1894, § 5410; Hoard v. Clum, 31 Minn. 186. But counsel now say that, not only is the West Publishing Company a necessary party, but that each member of the Typothetæ in whose establishment the defendants instituted a strike is a necessary party. There are two reasons why this objection is untenable: First, the complaint does not state that any damage occurred to any other member of the Typothetæ than the West Publishing Company. Second, for the reason that all the members of the Typothetæ are parties plaintiff to this action. The reason stated by the court in Gale v. Townsend, 45 Minn. 357, 360, as to defendants under a common name, applies equally to plaintiffs suing under a common name. Dimond v. Minnesota Savings Bank, 70 Minn. 298.

The last ground of the demurrer is that the complaint does not state facts sufficient to constitute a cause of action against Bookbinders' Union No. 37. Under section 5177, G. S. 1894, an association as such, under any name it has assumed, may be sued without bringing in as defendants all the individuals comprising the association. A judgment in such action would affect only the property of the association; but the right to maintain action against an association by service of process upon each and every member of the association was a right at common law which has never been abrogated by statute. The statute is not in derogation of the common law, but is supplemental and additional thereto. There never existed any reason against, there never was any legal objection to, suing an association of individuals unincorporated, if all the individuals were brought within the jurisdiction of the court. But oftentimes justice was thwarted because it was impossible to bring in all of the defendants, and therefore section 5177 was enacted for the purpose of avoidance of this obstacle, and as additional to the common-law right. Gale v. Townsend, supra; Cornfield v. Order Brith Abraham, 64 Minn. 261; Dimond v. Minnesota Savings Bank, supra; Taylor v. Order Railway Conductors, 89 Minn. 222; Jenkinson v. Wysner, 125 Mich. 89.

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The word business is not limited to organizations created for the purpose of money-making. State v. Young, 29 Minn. 474. The contract is specific and definite with reference to the field it covers and there is no lack of mutuality concerning the same. Sturges v. Crowninshield. 4 Wheat. 122; Spear v. Orendorf, 26 Md. 37; Potter v. Holmes, 72 Minn. 153; Staples v. O'Neal, 64 Minn. 27; Goward v. Waters, 98 Mass. 596. Labor unions have been sued, both in actions in tort and for injunctions. Barr v. Essex, 53 N. J. Eq. 101, and cases cited.

Daggett & Todd, for defendants.

Neither the St. Paul Typothetæ, nor the Bookbinders' Union No. 37, is an association for the transaction of business such as is contemplated by G. S. 1894, § 5177; Burnetta v. Marceline, 180 Mo. 241. The common-law rule is that a labor organization as such could not make a contract, neither could it sue or be sued, and unless our statute is broad enough to comprise and encompass an organization of this kind, the common law would still apply. These organizations, in contemplation of the law, are mythical beings. They are not in esse, have no legal existence, and not being associations for the transaction of any common business cannot sue or be sued. It is likewise patent, that if they cannot sue or be sued, neither can they make a contract.

The contract lacks mutuality and is void. Bailey v. Austrian, 19 Minn. 465 (535); Tarbox v. Gotzian, 20 Minn. 122 (139); Stensgaard v. Smith, 43 Minn. 11; St. Louis v. Matthews, 64 Ark. 398; Moon v. Mayor, 89 Law Times R. 595. The contract is void, as being in the nature of a contract of employment, made by the St. Paul Bookbinders' Union No. 37, for and on behalf of its members, and such an association cannot make a contract binding upon its members for their employment. Burnetta v. Marceline, supra; Jefferson v. Asch (53 Minn. 446) 25 L. R. A. 257, note; Ferris v. Carson, 16 Nev. 44.

BROWN, J.

This action was brought by the St. Paul Typothetæ, an unincorporated association of persons, firms, and corporations engaged in the business of printing and bookbinding, and the West Publishing Company, a corporation and member of the association, against the St. Paul Bookbinders' Union No. 37, an unincorporated association of printers and

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bookbinders, and the members thereof, to recover damages for an alleged breach of contract. Separate demurrers were interposed to the complaint, one by the Bookbinders' Union, and one by the individual members thereof, the grounds of which are (1) that plaintiff St. Paul Typothetæ has no legal capacity to sue, and (2) that the complaint does not state facts sufficient to constitute a cause of action against the union in favor either of the Typothetæ or the West Publishing Company. The demurrer as to the West Publishing Company was sustained, but overruled as to the Typothetæ. Both parties appealed.

The complaint alleges that the persons, firms, and corporations named therein, twenty five in number, are associated together and doing business in St. Paul under the name and title of "St. Paul Typothetæ"; that each of the said persons, firms, and corporations were at all times named therein engaged in publishing and bookbinding, and employers of such printers as were necessary to carry on and conduct their several enterprises; that the object in the formation of the Typothetæ was the protection and promotion of the interests of its several members, correcting abuses, promoting concerted action, reconciling differences, and adjusting controversies between employer and employee, and particularly in securing definite, stable, and harmonious relations between the various members of the association and their respective employees. It further alleges that defendant St. Paul Bookbinders' Union No. 37, is an unincorporated association composed of the persons named therein, the object and purpose of which is the advancement and protection of the mutual and individual interests of all its members in the matter of employment, labor, and wages, and especially the regulation of the relations between employer and employee in the bookbinding trade. It further alleges that on November 21, 1903, plaintiff St. Paul Typothetæ and defendant Bookbinders' Union, for a valuable consideration, by and through their officers entered into a certain contract, a copy of which is attached to and made a part of the complaint.

It is unnecessary here to set out the contract in full. It provides generally the terms of employment between the firms and corporations forming the Typothetæ, and the members of the union; classifying employees, and fixing their compensation in accordance with the nature of the work of each, and specifying generally the terms and conditions

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of employment. It specially provides that during the life of the contract no strike or lockout shall occur, and that any differences which may arise as to the construction of the contract shall be settled by arbitration, providing the parties do not reach an amicable agreement. The complaint alleges a breach of this contract on the part of the union and its members; that the members of the union in the employ of the West Publishing Company, a party plaintiff and member of the Typothetæ, went out on a strike without cause or provocation, and without a submission of their grievance to arbitration, to the great damage of that company. The complaint further alleges that at the time the contract was entered into it was well known, understood, and agreed by all the parties that said association, St. Paul Typothetæ, was not an employer of labor, and did not intend to employ any labor or workmen whatsoever, and that each and all the provisions, covenants, conditions, and agreements in said contract to be performed and kept by the union and its members were made for the benefit of each and all the members of the Typothetæ who were then employing, or should thereafter during the life of the contract employ, workmen.

The only questions necessary to be considered on this appeal are (1) whether the Typothetæ has legal capacity to sue, and (2) whether the complaint states a cause of action against the Bookbinders' Union. Whether the complaint states a cause of action in favor of the West Publishing Company against the individual members of the union is not presented by the demurrer. And whether it states a cause of action in favor of that company against the union, as an organization, is determined by the further question whether the union may be sued in its association name.

The Typothetæ and Bookbinders' Union, so far as their legal status is concerned, occupy the same position. Both are unincorporated voluntary associations, and the principles of law applicable generally to unincorporated clubs and societies apply to each. The position such organizations occupy under the law is a question upon which the courts are not fully agreed. It is generally acknowledged that they are sui generis, but the courts have had difficulty in agreeing upon the legal principles to apply to them. Many cases hold that in some of their relations they are to be regarded as copartnerships, and governed by the general laws applicable to that relation, and that in other respects

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the law of corporations applies to their affairs. The distinction in this respect is made (1) as to cases involving rights between the association and third parties dealing with it, and (2) as to cases involving controversies between the members respecting the property owned by the association. Niblack, Ben. Soc., 221. Such organizations are properly divided into two classes, viz., those organized for the purpose of conducting some business enterprise, and those whose purpose is solely the promotion of the interests and welfare of their members, unaccompanied by any business functions. As to this class, it would seem that the law of principal and agent should apply. Ehrmanntraut v. Robinson, 52 Minn. 333, 54 N. W. 188.

Both the Typothetæ and the Union come within this class. The Typothetæ is not a business association within the proper meaning of the term; it is not engaged in employing labor, or entering into trade contracts on its own behalf. Its exclusive occupation, as disclosed by the complaint, is that of promoting and protecting the persons, firms, and corporations composing it in controversies with their employees, and, as their representative or agent, entering into on their behalf contracts with such employees. So far as the complaint discloses, it has no capital stock and no property. The union is an association of employees or workmen organized for similar purposes; it has no capital stock or property; its members do not work under its authority or in its behalf, but for themselves.

But whatever may be the law applicable to such associations generally, there is one respect in which the authorities are agreed, and that is that at common law they are not, whether organized for business or other purposes, entitled to recognition in the courts in their association name. It is well settled that, in the absence of a statute otherwise providing, to be entitled to conduct judicial proceedings in court, a party litigant must be either a natural or artificial person. The rule is correctly stated in 22 Enc. Pl. & Pr. 230, where, in speaking of unincorporated societies, such as those here involved, it is said that such societies cannot maintain an action in their association name, but must sue in the name of the individuals composing them, however numerous they may be. Such societies, in the absence of statutes recognizing them, have no legal entity distinct from that of their members. The rule is followed by an unbroken line of authorities, though a different rule has been ap-

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plied in many of the courts in actions purely of an equitable nature. On the question generally, see Niblack, Ben. Soc. 183; Richardson v. Smith, 21 Fla. 336; Mexican v. Yellow Jack, 4 Nev. 40; Detroit v. Detroit, 44 Mich. 313, 6 N. W. 675; Danbury v. Bean, 54 N. H. 524; Mayer v. Journeymen, 47 N. J. Eq. 519, 20 Atl. 492; Nightingale v. Barney, 4 G. Greene (Iowa) 106; Barbour v. Albany Lodge, 73 Ga. 474; Steamboat Pembinaw v. Wilson, 11 Iowa, 479.

The rule has been changed and modified in many of the states by statutory enactments permitting such associations to sue and be sued in their adopted name. It is claimed in the case at bar that section 5177, G. S. 1894, has changed and modified it in this state. Such is not our understanding of the statute. It provides that when two or more persons associate in any business, transacting that business under a common name, whether it includes the names of such persons or not, the association may be sued by its common name. The statute has been considered in several cases, but in no case to which our attention has been called has it been held that such an association may bring suit in the name in which it carries on its business. The statute does not provide that actions may be brought in the name of the association, but only that actions may be brought against it. It was construed in Dimond v. Minnesota Savings Bank, 70 Minn. 298, 300, 73 N. W. 182, where it was said that it was enacted in the interests of creditors, to enable them to sue copartners or associations by the name under which they transact business, and thus avoid the difficulty of obtaining the names of all the persons forming the associations. "The statute was intended to enlarge, not to restrict, the common law in regard to suits against copartners. It does not permit partners or associates to bring an action in their common name, for they have the means of knowing who the associates are."

This interpretation of the statute is in strict accordance with its evident purpose. The common-law rule that the parties to an action must be either natural or artificial persons has been modified in this state, therefore, only as respects actions against unincorporated associations. An examination of the authorities discloses that in many of the states authority is expressly granted in such cases to sue and be sued, but such is not the statute in this state. The Typothetæ comes within the rule, and it is clear that it has no legal capacity to sue.

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The rule applies equally to defendant Bookbinders' Union. That is an unincorporated association similar to the Typothetæ, and cannot be sued in its common name. Many of the cases above cited were actions against such associations, in which the rule of the common law was applied. See also 22 Enc. Pl. & Pr. 242, where it is said that an unincorporated society or association, being considered at common law a copartnership, cannot, in the absence of statute, be sued in its society or association name; but all the members must be made parties, since such associations have, in the absence of statutory recognition, no legal entity apart from their members. This rule applies to the union, unless it comes within the scope of the statute providing for actions against persons doing business under a common name. The statute, it is clear, was not intended to include associations of this character. Its purpose was to authorize the courts to take jurisdiction over unincorporated associations engaged under a common name in some sort of business in which property is bought and sold, debts contracted—concerns owning and holding property, and incurring pecuniary liability—and not associations of the character of labor unions, having no property, engaged in no business occupation, in a proper sense of the term, and whose only function is the promotion of the interests and welfare of the persons who are members thereof. Such an association is not a copartnership, and the members thereof are liable, if at all, on the contracts of the association on the law of principal and agent. Ehrmanntraut v. Robinson, 52 Minn. 335, 54 N. W. 188. It is not a copartnership, because the association is engaged in no business enterprise.

In Burnetta v. Marceline, 180 Mo. 241, 79 S. W. 139, a case involving a contract made by a labor union, the court said: "The Miners' Union is not an organization for the purpose of conducting any business enterprise, but is purely one for the protection of labor against the unjust exactions of capital. The members of the union do not labor in coal mines for the organization, but each member works for himself; and whatever compensation he receives is for the benefit of himself and his family. That the Miners' Union, as an organization, cannot make a contract for its individual members in respect to the performance of work and the payment for it, in our opinion, is too clear for discussion." This citation is not directly in point, except in so far as it supports the proposition that the Bookbinders' Union is not a business association

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within the meaning and purpose of our statute. The same principle was laid down in Brown v. Stoerkel, 74 Mich. 269, 41 N. W. 921, a case involving an unincorporated association known as the "Knights of Labor."

Unless we are to depart from the interpretation given our statute in the Dimond case, supra, or enlarge it by judicial construction, it must be held that the union cannot be sued in its association name. This we do not feel justified in doing. If it is deemed wise that such associations be vested with authority to sue and be sued in their common name, the legislature, now in session, can readily so provide.

The defendant union is wholly unlike the associations involved in Cornfield v. Order Brith Abraham, 64 Minn. 261, 66 N. W. 970, Steinert v. United Brotherhood, 91 Minn. 189, 97 N. W. 668, and Taylor v. Order Railway Conductors, 89 Minn. 222, 94 N. W. 684. The associations there before the court were engaged in the business of insuring their members, a distinct and well-established line of business. Nor is the case similar to Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663. That was an action in equity to restrain the trades council and its members from certain threatened wrongful and unlawful acts. In cases of that character the courts will proceed against the association and its officers and members, but not against the association alone in its common name.

We have been cited to no case where the court has entertained an action of this kind against an association in its common name, where the point has been raised, and our research has disclosed but one, the Taff Vale case, which arose in England in 1901. Taff Vale v. Amalgamated, L. R. App. Cas. 1901, 426. It was there held that an association of employees, similar to that of the Bookbinders' Union, might be sued in its common name. But the decision was placed squarely upon the ground that such associations are expressly recognized and their organization provided for by act of parliament, and, though the act authorizing their organization did not expressly provide that they might sue or be sued, the court held that the right arose by necessary implication from the fact of legislative recognition and the provision of the law empowering the association to own and hold property. Many cases have been found where injunctions have been issued restraining

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labor unions, their officers and members, from threatened violations of the law, but cases of that nature are not in point.

It follows that the Typothetæ has no legal capacity to sue, and cannot maintain the action; that the Bookbinders' Union cannot be sued in its association name, and neither the Typothetæ nor the West Publishing Company can maintain the action against it. Whether, within the rule announced by this court in Ehrmanntraut v. Robinson, supra, on the law of principal and agent, a cause of action is stated in favor of the West Publishing Company against the individual members of the union, is not presented, and we do not determine it. The demurrer interposed by the individual members of the union does not raise the question, and we leave it for future consideration, should it ever arise.

The order of the court below overruling the demurrer as to the Typothetæ is reversed; that sustaining the demurrer as to the West Publishing Company against the union, as such, is affirmed.

LUDWIG L. NERLIEN v. VILLAGE OF BROOTEN and Others.[1]

March 10, 1905.

Nos. 14,201—(219).

Use of Municipal Building.

The use of a municipal building as a village hall for private commercial purposes is unauthorized, and, when objected to by a taxpayer or person injuriously affected through the business transacted, may be restrained by injunction.

Private Use—Injunction.

Where the village marshal is permitted by the municipality to spend a portion of his time in selling the vendible articles of a merchant therein, and is to some extent paid out of the public funds, the municipality may be restrained by injunction from continuing such diversion of the public funds.

[1] Reported in 102 N. W. 867.

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Appeal by plaintiff from an order of the district court for Stearns county, Searle, J., denying a motion for a new trial, after a trial and findings in favor of defendants. Reversed.

Stewart & Brower, for appellant.

E. M. Webster and *Reynolds & Roeser,* for respondents.

LOVELY, J.

This is an equitable suit brought to restrain the village of Brooten, in Stearns county, and other defendants, who were the trustees and officers of that village, from engaging or assisting a private citizen in the business of dealing in flour at the village hall, as well as the assistance of its marshal to conduct that business.

Upon the hearing of the evidence the court found that the plaintiff was a resident of the village of Brooten, which is situated in the town of North Fork, where he was a taxpayer. That he had been engaged in the mercantile business in Brooten for more than two years previous to the commencement of the action, conducting a store, and dealing in flour, feed, grain, and cereals. That one John Bohmer, who was president of the village council from March, 1899, to 1903, had been engaged in retailing flour at the village hall in Brooten in competition with the plaintiff. That the portion of the building occupied by Bohmer for his private business did not appear to have been necessary for public use, or allowed by virtue of any contract made with the village, or that any agreement had ever existed with reference to the payment of rent for the same. But the court also finds that, since Bohmer's occupancy and use of the village hall, the village marshal (an officer appointed by the council) had applied a portion of his time in retailing flour for Bohmer, and attended to the wants of his customers in that respect. That Bohmer has paid nothing for the use of such hall to the village, nor had he compensated the marshal for his services in the sale of flour, which amounted to at least two carloads per week. That the salary of the village marshal was, soon after his services for Bohmer commenced, raised by the village council, in view of the added labors which he was required to perform in selling flour. That small deficiencies or shortages in the marshal's accounts with Bohmer have been recognized, and allowances made therefor out of the village funds by the trustees. The court also finds that the plaintiff has suffered damages

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in the diminution of profits in his business by reason of the competition thus established and maintained, but finds that no unlawful acts had been committed which have resulted in increasing the taxes of plaintiff, and held that plaintiff is not entitled to an injunction to prohibit the privileges given which Bohmer is enjoying in his use of the hall, or from having the services of the marshal in conducting the business of selling flour therefrom.

The plaintiff asked for amended findings to the effect that the marshal was directed by the council to sell flour at the prices fixed by Bohmer, and that it was made his duty to attend to its sale at the village hall; that the use of the village hall was given by the village to Bohmer gratuitously; also that an arrangement was tolerated and permitted by the village and members of its council whereby Bohmer was given these privileges to cause loss to plaintiff in carrying on his business.

The entire evidence in the case shows conclusively that the facts in such amended findings are substantially established. While it does not appear from the evidence that there was any resolution, which in so many words was adopted by the council, that Bohmer should have the use of the village hall free and that the marshal should aid him, yet within the facts as actually found it does appear that the marshal's salary was increased and continued for several years and to the time of the commencement of the action; that the marshal's duties required him to act practically as the clerk of Bohmer while he was president of the council, and afterwards during the time of his successor. These facts were known to the members of the council. That during the latter portion of the time a bell was placed in front of the village hall, which customers could and did ring whenever they desired to purchase flour, when the marshal would leave the streets as soon as he could, and promptly repair to the hall to attend to their wants. It also appears that there was an advertisement, in the name of the village of Brooten, offering the flour for sale "cheapest in the state," published in a paper in an adjoining town (Belgrade Tribune), which must have been known by the trustees; and it is admitted by some of the members of the council, who were sworn, that the prices charged by defendant may have influenced the action of the council in their toleration and permission of the occupation of the village hall without rent by Bohmer for use as a storeroom for the sale of flour, and, while it does not appear directly

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that the place where the flour was sold was necessary for village uses, it was in a room devoted to the purposes of storing the fire apparatus of the municipality.

It cannot be questioned from the evidence that the members of the council knew of the conduct of the business, and, if they did not authorize it directly by resolution, they made no objection, but remained quiet and permitted it. Under such circumstances, if it was their duty to preserve the property of the village from use for commercial purposes by a favored person to his benefit, the conclusion is unquestionable that they did nothing to interfere, and were derelict in their duty in that respect.

It cannot be doubted that municipal corporations in this state have only such powers as are delegated by law. That among the obligations imposed upon such bodies are the protection and care of the property belonging to the public, and where, as in this instance, the property is a village hall used for public purposes and the storage of implements and apparatus for extinguishing fire, the misuse of such place, and the application of funds raised by taxation to build and operate the hall, are diversions of the same from its proper purposes, to which a taxpayer has a right to complain, and a private individual owning property in the municipality, whose business is injured thereby, may well and properly object. Whether it was shown that the taxes of the plaintiff were increased specifically, it may reasonably be presumed that they were, and he is authorized, as such taxpayer and property owner, to have injunction to restrain the unlawful use of the public funds or the public property which effectuates his particular injury. Scofield v. Eighth School District, 27 Conn. 499; Hurd v. Walters, 48 Ind. 148; Weir v. Day, 35 Oh. St. 143; Spencer v. Joint School District, 15 Kan. 259. See also the consideration of the principle involved in this case in the Opinions of the Attorneys General (1858–1884) 423, letter to D. Burt, Superintendent of Public Instruction.

While the learned trial court finds that the village of Brooten does not threaten to continue the acts referred to, we regard this finding as immaterial and of no significance, for the continuance of the privileges without objection or interference by the officers of the village, their payment of the marshal for his services to the present time to aid in the commercial enterprise of a favored citizen, without any suggestion

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by the defendants that the course pursued will be abandoned, justifies the inference that it will be continued unless restrained. Under such circumstances it is fair and reasonable to presume that a profitable business whereby the favored individual can sell his flour without paying rent for the storeroom from which it is dispensed, and the aid of an assistant to whom he gives no compensation, which places him at an advantage, will not be changed. The plaintiff had a right to think so, and was justified in seeking the protection of the court.

It can be no justification that the giving of these privileges to the favored person with use of the village property and the aid of a competent person to assist in doing his business, would tend to cheapen the price of the article to be sold below that which would be within the power of a private citizen engaged in the same business. To secure this result in this way would involve the municipality in a business enterprise, which cannot be justified, at least without direct authority from the legislature.

The order for a new trial, which was denied, is reversed, and the cause remanded for further proceedings in accordance with the views above expressed.

PETER STEFFENS v. MAMIE E. NELSON and Others.[1]

March 10, 1905.

Nos. 14,205—(60).

Receipted Bill.

An itemized bill, marked as paid, is a receipt for the items contained in that bill.

Estoppel—Ratification.

The substance of estoppel is the inducement to another to act to his prejudice. The substance of ratification is confirmation after conduct.

Ratification of Act of Wife.

If a husband ratify the act of his wife in signing a receipt in his name without authority, the ratification extends to the natural use of that

[1] Reported in 102 N. W. 871.

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receipt, including its production to the debtor as evidence of payment, although the check given in payment of the debt, indorsed by the principal after such use of the receipt, is not in fact paid.

Action in the district court for Hennepin county to foreclose a mechanic's lien upon the property of defendant Mamie E. Nelson. The case was tried before Spooner, J., sitting for the judge of the Second judicial district, who made findings of fact and as conclusions of law found that plaintiff, and defendants Palace Clothing House Company, Henry Enger, E. M. Orton and F. W. Delamater & Son were entitled respectively to judgment for the full amount of their several lien claims. From an order denying a motion for a new trial defendant Mamie E. Nelson and husband appealed. Modified.

Frederick L. McGhee, for appellants.

F. J. Geist, for respondent Peter Steffens.

Cohen, Atwater & Shaw, for respondents Palace Clothing House Company and Henry Enger.

Lewis E. Stetler, for respondent E. M. Orton.

Lane & Nantz, for respondents F. W. Delamater & Son.

JAGGARD, J.

The plaintiff brought this action to foreclose a mechanic's lien on the property of the defendant Nelson for materials furnished under the owner's contract with defendant Dissette. Other lien claimants, and the Palace Clothing House Company, as assignee of other lienholders, were joined as defendants. On April 12, 1902, Nelson, the owner, and one Johnson, the agent of the mortgagee loaning money on the house in course of construction, paid the balance of the agreed price to the contractor, on his delivery of receipts signed by certain lien claimants, and of his affidavit that all lien claims had been paid in full. The contractor procured these receipts by giving to the lien claimants his checks, payable at a later date. Payment on all these checks was refused.

The trial court held that all claimants whose receipts were delivered before the time of, and were present at, the settlement, were estopped from asserting their claims in this action. Accordingly, judgment was ordered for certain defendants because the testimony did not sufficiently

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show that their receipts were present at the time of the settlement. There was no objection, exception, or assignment of error directed to these propositions of law; the error complained of concerned the facts, which the court found as to the various defendants, to bring them within the application of the admitted equitable doctrine. The case of the plaintiff was peculiar to itself, as will presently appear. From the motion denying a new trial, the defendant Nelson appealed. In this court the appeal was dismissed as to the defendant E. M. Orton by stipulation.

1. The only substantial error presented by the exceptions and assignments of error occurs as to the plaintiff and as to the defendants Delamater & Son. In all other cases, a careful examination of the record has satisfied this court that the trial court was justified in its conclusions of fact and of law. As to the defendants Delamater & Son, the court found, as matters of fact, that these defendants had furnished material and labor of the reasonable value of $263.27; that no part of this, excepting $100, had been paid; that the contractor obtained a receipt for $135 from these defendants on account of their said claim. As a matter of law, the court concluded that these defendants were entitled to judgment for $163.27, with interest, attorney's fees, and costs. The testimony, however, shows conclusively that these defendants Delamater & Son had marked on an itemized bill of goods sold to J. J. Dissette, the contractor, aggregating $237.22, including one item, "contract G. W. Nelson job $235," these words, namely "Paid April 11-04."

An itemized bill marked as paid is a receipt of that bill. The findings of the court, therefore, should have been that these defendants delivered a receipt for $235, and not for $135. This receipt was executed on April 11, according to the receipt and to the testimony of Delamater père. Defendant Nelson testified that this receipt was present at the settlement on April 12. In this he is corroborated, and not essentially contradicted, by other testimony. The amount for which the lien was allowed by the court included $28.80 of extras. While the testimony on this point is exceedingly unsatisfactory, it is still sufficient to sustain the findings of the trial court. Defendants Delamater & Son are entitled, accordingly, to judgment for the difference between $263.27, to which they were found entitled under their lien, and $235, for which

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defendants executed a receipt, together with interest on that difference since March 21, 1902, $5 attorney's fees, and costs and disbursements in this action.

2. The plaintiff Steffens had no office; he had placed the number of his residence on his cards and billheads. The agent of the contractor called there in Steffens' absence, gave his wife a check of the contractor, dated ahead, for the amount of Steffens' claim, and directed her to sign a receipt. She signed that receipt, "Peter Steffens, Maria Steffens." She had no express authority from her husband so to do. This receipt was taken by the contractor to the owner and agent of the mortgagee, and was present at the time of settlement with the contractor about noon on Saturday, April 12. On the afternoon of that day the wife gave her husband the contractor's check, and explained that she had to sign a paper for it. The husband took the check and deposited it; that check was never paid.

The wife, like another person, may be made an agent for her husband, and as such impose upon him obligations by his authority, express or implied, precedent or subsequent. Hopkins v. Mollinieux, 4 Wend. 465; Benjamin v. Benjamin, 15 Conn. 347; Willingham v. Simons, 1 Desaus. (S. C.) 272.

The proper decision of the question thus presented depends upon consideration of a neglected distinction between ratification and estoppel. Lord Coke said, "The name 'estoppel' or 'conclusion' was given because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." However much this definition may have been criticised as vicious, Everest & Strode, Est. 9–16; Bigelow, Est. 5, it is a brief statement of the effect of the essential principle of estoppel, viz., "that, wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." Lickbarrow v. Mason, 2 T. R. 63; 1 Smith, Lead. Cas. 759; Ewart, Est. IX. Ratification, on the other hand, means confirmation. "To ratify is to give sanction and validity to something done without authority." Evans, Pr. & Ag. (Bedford's Ed.) 90. The underlying principle upon which liability for ratification attaches is that he who has commanded is legally responsible for the direct results and for the natural and probable consequences of his conduct, and that it

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is immaterial whether that command was given before or after the conduct.

The substance of estoppel is the inducement to another to act to his prejudice. The substance of ratification is confirmation after conduct. "This is enough," said Mr. Bigelow, "to indicate that there may be danger in using the term 'estoppel' freely. It is common enough at present to speak of acquiescence and ratification as an estoppel. Neither the one nor the other, however, can be more than part of an estoppel at best. An estoppel is a legal consequence—a right—arising from acts or conduct, while acquiescence and ratification are but facts presupposing a situation incomplete in its legal aspect, i. e., not as yet attended with full legal consequences. The most that acquiescence or ratification can do—and this either may under certain circumstances do—is to supply an element necessary to the estoppel, and otherwise wanting, as, e. g., knowledge of the facts at the time of making a misrepresentation. But each stands upon its own grounds, and must be made out in its own way, not necessarily in the way required by the ordinary estoppel by conduct." Bigelow, Est. (5th Ed.) pp. 456, 457. And see Reinhard, Ag. § 101.

An unauthorized act may be made to operate by ratification as an estoppel upon the person in whose behalf it was done. That ratification presupposes knowledge on the part of such person ratifying. If he intentionally ratify what another has done for him without authority, and actually or constructively knows also of the circumstances connected with the unauthorized acts which are the basis of the estoppel, he should clearly be held bound thereby. See Dimond v. Manheim, 61 Minn. 178, 63 N. W. 495.

In this case the acceptance of the check given to plaintiff by his wife operated to ratify the receipt signed by her for him. In the eyes of the law, at least, he knew that this receipt would be used as evidence of the payment of the debt by the contractor to whom it was delivered. He is responsible for the direct results and the natural and probable consequences of the act he has ratified. His situation is not therefore different, in law, from that of other creditors who signed receipts before the date of settlement, and who, as he did also, accepted and now retain the check of the contractor. He is not entitled to recover because of his ratification. See Ewart, Est. 133, 137, 139.

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The judgment appealed from is affirmed, except as to the plaintiff, Steffens, and the defendants Delamater & Son. As to them, let judgment be entered in accordance with this opinion.

STATE ex rel. JOHN D. BARRETT and Another v. DISTRICT COURT OF PINE COUNTY and Others.[1]

March 10, 1905.

Nos. 14,245—(229).

Transitory Action.

An action to cancel a contract for the sale of land on the ground of fraud, and for the recovery of the purchase price paid by the vendee before the discovery of fraud, in which it does not appear that the vendors had title to the land, and in which no relief as to any real estate record is involved, is a transitory, not a local, action.

Alternative writ of mandamus issued from the supreme court, upon relation of John D. Barrett and another, directed to the district court for Pine county, the judges and clerk thereof, requiring them to transmit to Ramsey county the files and records in the action of A. B. Deahl against relators, or to show cause to the contrary. Peremptory writ granted.

O'Brien & Albrecht, for relators.

Robert C. Saunders, for respondents.

JAGGARD, J.

In this case, plaintiff commenced an action in the district court of Pine county against the relators, as defendants, to cancel, on the ground of fraudulent misrepresentations, a contract for the purchase of land in Pine county, and to recover the purchase money paid by plaintiff to defendants before the discovery of the fraud. The complaint contains no allegation that the vendors had any title to the land. Demand for change of venue from Pine county to Ramsey county, together with affidavit of residence of the relators at the time of commencement of the action in the latter, was duly served. Plaintiff noticed the cause for trial

[1] Reported in 102 N. W. 869.

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at the September general term of the district court in Pine county. Thereafter relators answered, and moved that the clerk be ordered to transmit all the files and records in the case to Ramsey county. The district court of Pine county denied this motion. Thereupon the relators petitioned this court for an alternative writ of mandamus, setting forth the pleadings and the facts aforesaid, so as to present the entire record here. Pursuant thereto, an alternative writ was granted by this court. The respondents appeared, and moved to quash and dismiss the same, on the grounds that the petition did not state facts sufficient to justify its issuance, or to entitle relators to the demands of their petition and writ. This practice properly presents on the merits the contentions of the respective parties. State v. District Court of Meeker County, 77 Minn. 302, 79 N. W. 960; State v. District Court of Chippewa County, 85 Minn. 283, 88 N. W. 755.

The question here presented is whether an action to cancel a contract for the sale of real estate on the ground of fraud, and for the recovery of the purchase price paid by the vendee before the discovery of the fraud, must be tried in the county where the land is situated, or in the county where the defendants, the vendors, reside, where it is not made to appear that the vendors had title to the land, and where no relief as to any real estate record is involved. The common law applied the maxim "debitus et contractus sunt nullius loci." Blackstone describes local actions as being those in which "possession of land is to be recovered, or damages for an actual trespass or for waste, etc., affecting land"; and transitory actions as being those which are brought for "injuries that might have happened anywhere, as debt, detinue, slander, and the like." 3 Black. Com. *294.

The recognition of the right of trial at place of residence was very greatly extended by the courts of equity. In overruling an objection to the jurisdiction of an English court in setting aside a rent charge on Irish lands on the ground of fraud, Chancellor King said: "This is surely only a jest put upon the jurisdiction of this court by the common lawyers; for when you go about to bind the lands and grant a sequestration to execute a decree, then they readily tell you that the authority of this court is only to regulate a man's conscience, and ought not to affect the estate, but that this court must agere in personam only; and when, as in this case, you prosecute the person for a fraud, they tell you

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you must not intermeddle here, because the fraud, though committed here, concerns lands that lie in Ireland, which makes the jurisdiction local, and so would wholly elude the jurisdiction of this court." Arglasse v. Muschamp, 1 Vern. 75. And see Penn v. Lord Baltimore, 1 Ves. 444, 2 White & T. Lead. Cas. Eq. 1806; Brett, Lead. Cas. Eq. 254; Ewing v. Ewing, L. R. 9 App. Cas. 34.

The same rule was early adopted and has been substantially enforced in the United States. In Massie v. Watts, 6 Cranch, 148, 160, Chief Justice Marshall said: "In a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree." And see Watts v. Waddle, 6 Pet. 389.

The limitations imposed upon the jurisdiction of state courts by state boundaries have not affected the substance of the rule, but have merely restricted the extent of its application in fact, and the operation of decrees, to imposing personal obligation only, as distinguished from creating, transferring, or vesting title to lands outside the state. Lindley v. O'Reilly, 50 N. J. L. 636, 15 Atl. 379. And see Spurr v. Scoville, 3 Cush. 578; Merrill v. Beckwith, 163 Mass. 503, 40 N. E. 854; Hawkins v. Ireland, 64 Minn. 339, 67 N. W. 73. As to lands within the various states, the courts generally have recognized that, when a court of equity acts upon a matter over which it has jurisdiction, it is immaterial that real estate may be indirectly involved. A court of equity will afford proper relief to parties to contract in cases of equitable cognizance; the fact that the relief granted may incidentally concern land does not at all determine the subject-matter before the court.

Accordingly, a suit to set aside a deed and obtain a specific enforcement of a contract has been held to be transitory. Hayes v. O'Brien, 149 Ill. 403, 37 N. E. 73. And see Maduel v. Tuyes, 30 La. An. 1404; Copley v. Berry, 12 Rob. 79; Phillips v. Cotton, 48 La. An. 404, 19 South. 258; Lindley v. O'Reilly, supra; Spurr v. Scoville, supra; Merrill v. Beckwith, supra. And, where an action on covenant broken is founded on privity of contract between the parties, it is transitory; but where it is founded on privity of estate, it is local, and must be sued in the county where the land lies. Lienow v. Ellis, 6 Mass. *331; Clark v. Scudder, 72 Mass. 122; White v. Sanborn, 6 N. H. 220; Birney v. Haim, 2 Litt. (Ky.) *262.

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Various statutes have affected this common-law rule. However different in terms, they substantially re-enact it, and incline rather to enlarge than to restrict the right of trial at residence. Under the New York statute, upon which the Minnesota section is based, Johnson, J., in holding that an action to rescind a contract for the purchase of land on the ground of fraud was transitory and not local, said: "The inquiry is, what is the cause of action? Is it an alleged fraud which vitiates the contract, or is it an alleged right or interest growing out of the contract, that is to be tried and determined? The two things are essentially and radically different, and it is only by confounding them that this can be made to appear a local action." Ely v. Lowenstein, 9 Abb. Pr. (N. S.) 42. And see Rawls v. Carr, 17 Abb. Pr. 96; Wood v. Hollister, 3 Abb. Pr. 14; Hubbell v. Sibley, 4 Abb. Pr. (N. S.) 403; Acker v. Leland, 96 N. Y. 383. But see Moss v. Gilbert, 18 Abb. N. C. 202.

The Kansas statute, so far as this case is concerned, is identical with the Minnesota statute. In Close v. Wheaton, 65 Kan. 830, 70 Pac. 891, the court held that an action to compel a specific performance of an agreement to convey land, involving an obligation in contract merely, without any element of trust, is a transitory proceeding. Such an action is brought to enforce a purely personal contract. "Of course, if the defendant obeys the decree, the title will pass * * *; but, nevertheless, the object of the suit is not to determine the title, but to compel the defaulting party to abide his agreement." Under similar statutes, an action to cancel a deed for fraud (Lehmberg v. Biberstein, 51 Tex. 457; and see Finch's Heirs v. Edmonson, 9 Tex. 504), and an action to annul the appointment of an administrator and to set aside the sale of land by the administrator for the payment of debts (McMannus v. Bush, 48 Ind. 303), have been held to be transitory.

In Kentucky, under a statute different in terms, but not materially in effect, a suit for rescission of a contract for the purchase of land on the ground of fraud was held to be transitory. Thompson v. Elmore (Ky.) 18 S. W. 235. And see Dunn v. McMillen, 4 Ky. 409, 410; Kendrick v. Wheatley, 33 Ky. *34; Shouse v. Taylor, 115 Ky. 22.

In Minnesota the place of trial of actions by the district court of that state is either where the defendant resides (G. S. 1894, § 5185), or where the land is situated (section 5183). The relevant portion of the latter section is as follows:

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> All actions for the recovery of real property or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property, shall be brought and tried in the county in which the subject of the action or some part thereof is situated. * * * If the county designated in the complaint is not the proper county the court therein shall have no jurisdiction of said action.

The method for changing venue in proper cases is prescribed by section 5188, as amended by chapter 345, p. 627, Laws 1903, and chapter 28, p. 147, Laws 1895. These laws neither limit nor repeal section 5188. Kretzschmar v. Meehan, 74 Minn. 211, 77 N. W. 41.

The rule in this state is the general one: that an action must be brought and tried where the parties reside, and that trial where the subject-matter is situated is an exception to the rule. To bring a case within this exception, the subject-matter must be held to be local. Smith v. Barr, 76 Minn. 513, 517, 79 N. W. 507. It is true that this court has held that an action to cancel a real estate mortgage and to expunge the local record thereof must be brought and tried in the county where the mortgaged property and the record are situated. Kommer v. Harrington, 83 Minn. 114, 85 N. W. 939. But this court has also held, where an action was brought by the heirs to avoid an administrator's sale of land, to recover lands in the hands of the purchasers, and to have an accounting of and judgment for the proceeds of land sold, that it was impossible to divide the matter into two separate actions, and that, inasmuch as the recovery of proceeds was the principal relief sought, and the recovery of the land in specie was merely incidental, therefore the action could be brought at the place of residence, and need not be brought in the county in which the land was situated. Smith v. Barr. An action to set aside a judgment has been held to be transitory, because the principal object of the action was its avoidance, although incidentally it might operate upon interest in land in another county. State v. District Court Chippewa County, 85 Minn. 283, 88 N. W. 755.

In this case, upon the pleadings, the only thing the court has to do with at all is a contract and fraud. The principal thing sought is the recovery of a money judgment. It does not appear that the defendants

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owned the land, that the contract was recorded, or that this decree will in any way necessarily affect the actual title to land. See Miller v. Kern, 140 Cal. 132, 73 Pac. 836.

The prayer of the petitioners is accordingly granted, and it is ordered that the case be stricken from the trial calendar of the district court of Pine county, and that all the records in this action be transmitted to the clerk of the district court of Ramsey county.

CYRUS WEBBER v. J. A. AXTELL and Others.[1]

March 24, 1905.

Nos. 14,213—(77).

Riparian Rights on Inland Lake.

On an inland body of water which was a navigable lake under Lamprey v. State, 52 Minn. 181, a shore owner acquired from the United States four meandered lots. Fifteen rods from these lots, between the same and the center of the lake, was an island which was not surveyed or reserved to the government when the patent was issued. Several years afterwards other parties caused this island to be surveyed, and obtained a patent therefor from the United States. A controversy arose between the claimants under the two patents for possession of the property which was litigated in this suit. At the time it was commenced, accretions had established a sand bar between the island and the property of the shore owner. *Held*, upon findings showing these facts:

1. That the riparian rights of the first patentee vested in him a contingent interest in all relictions and accretions by change of the water line, which included the island in question at the date of the patent from the government.

2. That the first patentee could not be deprived by the later patentee of such vested interest.

3. That the evidence in this case was not sufficient to show that the first patentee had estopped himself from asserting his title as against the second patentee.

[1] Reported in 102 N. W. 915.

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Action of ejectment in the district court for Martin county. The case was tried before Quinn, J., who found in favor of plaintiff. From an order denying a motion to amend the conclusions of law and denying a new trial, defendants appealed. Affirmed.

C. M. O'Neill, Albert R. Allen and *De Forrest Ward,* for appellants.

Fox Lake is a navigable lake; public, as distinguished from private waters. Lamprey v. State, 52 Minn. 181. Being public waters, plaintiff's title to the shore lands extends only to low water mark, and does not include the island. Railroad Co. v. Schurmeier, 7 Wall. 272; Lamprey v. State, supra; Brisbine v. St. Paul & S. C. R. Co., 23 Minn. 114; Union Depot, St. Ry. & T. Co. v. Brunswick, 31 Minn. 297; Village of Wayzata v. Great Northern Ry. Co., 50 Minn. 438; Security L. & Exp. Co. v. Burns, 87 Minn. 97; Carli v. Stillwater St. Ry. & T. Co., 28 Minn. 373; Hanford v. St. Paul & D. R. Co., 43 Minn. 104.

Since the lake is navigable, and at the time the original government survey was made in 1857 the island in question was a true island (as to which the original plat, the field notes and survey are conclusive) or in other words, since the island was not included in the original survey, plaintiff took no title to the same. Both parties, the government and the patentee, are bound by the patent and the plat. Collins v. Asheville, 128 N. C. 563; Jones v. Johnston, 18 How. 150; Executors v. Hollister, 18 Vt. 294; 13 Cyc. 548, 549; Noonan v. Lee, 2 Black, 499; Slauson v. Goodrich, 99 Wis. 20; 3 Washburn, Real Prop. 460; Tiedeman, Real Prop. § 841; 1 Warvelle, Vendors, § 375; Cunningham v. Village of Willow River, 68 Minn. 249; St. Paul, S. & T. F. R. Co. v. First Division, 26 Minn. 31; Lamprey v. State, supra; Borer v. Lange, 44 Minn. 281; Reed v. Lammel, 28 Minn. 306.

Knox, Faber & Knox, for respondent.

In this state the rule of the common law as applied to rivers above tide water has been fully adopted and extended to our inland lakes, with this modification, viz.: That where such rivers and inland lakes are in fact navigable either for commercial purposes or pleasure, the waters belong to the public to low-water mark and the title of the owner is held to extend only to such low-water mark; but in all other

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respects the rule of the common law is recognized and followed, and the riparian owner in such streams and lakes is accordingly held to be the owner of all accretions, and of all land left dry by the recession of the waters, and of all islands to the thread or center of the stream. Lamprey v. State, 52 Minn. 181; Railroad Co. v. Schurmeier, 7 Wall. 272.

Meander lines are never boundaries, and the purchaser of land from the government which is meandered upon a body of water is not bound by the meander line between such meandered land and the water, but takes to the water. The title to the soil in fresh-water streams and lakes which can be navigated, including all intervening islands, is vested in the riparian owner subject to the public easement of navigation. Tiedeman, Real Prop. § 835; Schurmeier v. St. Paul & Pac. R. Co., 10 Minn. 82 (102); Lamprey v. State, supra; Chandos v. Mack (Wis.) 10 L. R. A. 207; Hardin v. Jordan, 140 U. S. 371; Olson v. Thorndike, 76 Minn. 399; Everson v. City of Waseca, 44 Minn. 247.

A patent issued by the United States passes the land not only as it was at the time of the survey, but as it was at the date of the patent. Jefferis v. East Omaha Land Co., 134 U. S. 178. The riparian or shore owner, as such, is the owner of all unsurveyed islands between the shore line and the thread or center of the stream or lake. Schurmeier v. St. Paul & Pac. R. Co., supra; McCullough v. Wall, 4 Rich. Law, 68; Middleton v. Pritchard, 3 Scam. 510; Hardin v. Jordan, 140 U. S. 371; Chandos v. Mack, supra; Mitchell v. Smale, 140 U. S. 406.

To constitute an estoppel in pais the party estopped must be guilty of actual fraud or such culpable negligence as would operate as a fraud upon the opposite party. 11 Am. & Eng. Enc. (2d Ed.) 421; Bigelow, Est. (5th Ed.) 569; 2 Pomeroy, Eq. Jur. (2d Ed.) § 806; Pence v. Arbuckle, 22 Minn. 417; Hawkins v. Methodist Episcopal Church, 23 Minn. 256.

LOVELY, J.

Plaintiff in this action seeks to recover an island in one of the smaller lakes of Martin county, about fifteen rods distant from four government lots which he entered and patented under the homestead laws

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of the United States. The cause was tried to the court, who, upon findings of fact, held as a conclusion of law that plaintiff was entitled to judgment declaring him to be the owner of the land in suit, and ordered judgment in his favor. This appeal is from an order denying amended findings and for a new trial.

We are of the opinion that this cause must be determined upon the facts as found by the court, but it is necessary to premise, before calling particular attention thereto, that the original survey of township 103, range 32 (Martin county), was made by the United States in 1857, that partly located in this township is a small meandered body of water about three and a half miles in length and one-half or three-fourths of a mile in width, known as Fox Lake, on the northwest shore of which is located a tract of land surveyed and platted by the government as lots 2, 3, 5, and 6 in section 31, town 103, range 32. About fifteen rods from the shore of this lake, and opposite the government lots referred to, is the tract of land in controversy. In making the original survey it was marked on the plat and indicated in the field notes as an island containing two acres, with good timber of oak, ash, and hackberry; but no actual survey was at that time made of such island, nor was it designated in any way as a specific part of the public domain, nor was there any indication on the plat that it was reserved as a part thereof. In 1865 plaintiff settled upon and entered lots 2, 3, 5, and 6 as a homestead, and then claimed that this so-called island was a part thereof; and the evidence supports the view that he occupied it as such until the fall of 1885, when, upon the application of a third party, one McConville, the United States caused the alleged island to be surveyed, platted and designated it as lot 10, then accepted McConville's entry. McConville made some improvements on the land, but did not continue his settlement, when, in 1887, one Rice made an entry to this tract under the homestead laws.

February, 1873, a patent was issued to the plaintiff for lots 2, 3, 5, and 6, and in 1891 a patent was issued to Rice for lot 10, being the so-called island, which had by recession of the water grown in size considerably. The defendants claim under Rice's entry by purchase. During a considerable portion of the time after Rice made his entry, the so-called island was occupied either by him or his tenants, and the question of adverse possession was litigated by the defendants

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under this contention. The substantial basis of plaintiff's claim to the land in controversy, however, rests upon the asserted rights accruing to him under his homestead entry of 1865. Defendants claim the island under Rice's entry and the patent issued to him in 1891. It is likewise insisted in defendants' behalf that, by the acts and representations of plaintiff himself, he is now estopped from asserting any interest therein.

The material facts above stated we do not regard as open to dispute, but at the trial evidence was received to show that from the time plaintiff settled upon his homestead there were attached to the so-called island (lot 10) two sand bars which at ordinary stages of water permitted access to it by teams at certain periods of the year, and it was found by the court, when the suit was brought, that the shore where plaintiff's lots were situated was connected with such island in times of ordinary low water by this means, and in times of high water submerged. This was contested. The claim that defendants held under adverse possession was clearly a question of fact, and the court held, upon sufficient evidence to justify its findings in this respect, that it had not been established. The court also declined to hold, upon application for amended findings, that the plaintiff was estopped from asserting his title to the land in controversy.

Had the trial court determined as a matter of fact that at the time of the patent to plaintiff either one of the sand bars referred to connected the island with the shore line of his lots, there could be no doubt but that it would be our duty to hold that the decision of this case would be controlled by Schurmeier v. St. Paul & Pac. R. Co., 10 Minn. 59 (82), wherein it was held that the water, instead of the meander line, must be regarded as the proper boundary of such tract. The decision of this case was sustained by the Supreme Court of the United States on writ of error (Railroad Co. v. Schurmeier, 7 Wall. 272), where it was decided that the meander lines on fractional tracts adjacent to public waters are designated in the field notes, not as boundaries, but for the purpose of ascertaining the quantity of land in the fraction, and also that the riparian owners retain their rights to construct suitable landings, wharves, etc., for the convenience of commerce and navigation, to the same extent as such proprietors on navigable streams affected by the ebb and flow of the tide at common law.

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But counsel insist that the facts as found by the trial court indicate that it did not give decided or sufficient significance to the time when the sand bars appeared between the plaintiff's lots and the island, and that such bars should have been formed previous to the commencement of the suit, and have been existing when plaintiff received his patent, to bring plaintiff's rights within the benefit of the Schurmeier case. Counsel argues that since the court did not find that the sand bars existed before the suit was commenced, or before the subsequent survey and patent to Rice in 1891, therefore the patent to the latter could not cut off the rights of Rice or those claiming under him. The decision in the Schurmeier case, both in the state and federal courts, impresses us very strongly that it was the accepted view that the riparian rights of the first proprietor vested in him a contingent interest in all accretions and relictions, which would necessarily involve the sand bars and adjacent island; for, if it be true that the right of the shore owner in a body of navigable water carries with it a dependent interest to accretions and relictions, which became established at the time of his patent, an attempt on the part of the government to interfere with such rights afterwards would be ineffectual to take from him such right or interest. See cases cited in Sage v. Rudnick, 91 Minn. 325, 98 N. W. 89, 100 N. W. 106.

There has been much discussion as to the distinction between navigable and nonnavigable lakes, so called, which arises from the relative rights of the public and shore owners to use the waters therein; but if Fox Lake was a navigable body of water, as must be conceded, the shore owner became vested with a contingent interest in such accretions as might be added to his land, which would follow as an incident thereto, and became his property. If the island between the shore and the center of the lake when the patent was first issued was unsurveyed, without any expressed intention on the part of the government to treat it as a portion of its dominion, it would accrue to plaintiff. We are very clear that this rule has been laid down in the case of Lamprey v. State, 52 Minn. 181, 53 N. W. 1139, where the distinction between navigable and nonnavigable lakes is considered and defined, and where it was held that the shore owner of a navigable stream or body of water is entitled to the riparian right of accretions, even though larger than the parent estate, which is an incident to all riparian ownership, and

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that this rule rests upon the broad principle that, to preserve the fundamental riparian right, viz., access to the water, upon which all others depend, and may constitute its principal value. This establishes the contingent interest to such accretions as would include the sand bars and appurtenant island in this case.

The reasons for this view are fully considered and discussed in Lamprey v. State, supra, and, applying the rule there laid down to the fact that as to this small island, at the time of the government survey and patent to plaintiff, the government of the United States made no claim, but treated it as the bed of the lake, which belonged to the state, subject to the rights of riparian owners, it fully sustains the learned trial court in the conclusion that plaintiff's interest became vested at the time of his patent, and established his ownership thereto.

It was insisted on the argument that plaintiff had estopped himself from asserting his title to the property in question by reason of the fact that Rice was led to make his entry by plaintiff's advice and representations. The court declined to find, at the request of counsel, that plaintiff had estopped himself in this respect, and we are of the opinion that the evidence did not require such a finding. It appeared that plaintiff had, for several years after his occupation of the shore lots, occupied the land in question for pasturage, had fenced it, and continued to treat it as an appurtenant to the land he had entered until 1885, when one McConville had it surveyed and attempted to establish a resort on the island. The claim of McConville was contested by Rice, which resulted in the entry made by the latter. The facts regarding the situation were open to all parties, and while plaintiff showed partiality to Rice over McConville, and went to the land office with Rice as his witness, yet it does not appear that he gave Rice to understand that he would yield his own claim to the property or intended to do so. There is no evidence whatever upon which to base a finding that Rice was deceived or misled as to the facts upon which his ownership to the property could rest. Neither was there any renunciation of plaintiff's interest therein, nor that Rice was induced by any fraudulent act or misrepresentation to part with anything which he possessed or had acquired; also that in the struggle for the property Rice knew what plaintiff's rights were, and acted accordingly.

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Other assignments of error are unimportant, and need not be considered.

Order of the trial court is affirmed.

LEWIS, J. (dissenting).

The decision is based upon the ground that the plaintiff, as riparian owner, was, by virtue of his patent, vested with a contingent interest in all relictions which might be subsequently developed.

According to the findings, it must be conceded that at the time of the second survey in 1885 the island had not become connected with the mainland by formation of the sand bar, although the lake had been falling gradually for several years. At the time his patent was issued, plaintiff acquired no right, title, or interest in the island upon any theory of the law. This is not within the doctrine of the Schurmeier case, for the reason that prior to 1885 there was a well-defined open and navigable portion of the lake between the shore and the island, and defendants' title vested before plaintiff's accrued. Plaintiff was not the owner at that time under the principles announced in the Lamprey case, for the reason that, the lake being navigable, his line of ownership was limited to the water's edge, and his title as riparian owner by reliction and accretion did not accrue in time to avail him.

I do not concur in the views upon which the decision rests, viz., that the riparian owner acquired with his patent to the shore land a contingent interest in and to the island, based upon the possibility that at some future time, either by the action of or the recession of the waters, the island would become connected with the mainland, regardless of other rights subsequently acquired. In stating the general principles with reference to the title to such bodies of water, it is said in the case of Lamprey v. State, supra: Where a meandered body of water is in fact nonnavigable, the patentee of the land bordering on it takes to the middle of the lake, and, where the lake is navigable in fact, its waters and bed belong to the state in its sovereign capacity, and the riparian patentee takes the fee only to the water's edge, but with all the rights incident to riparian ownership of navigable waters, including the rights of accretions formed or produced in front of his land by the action or recession of the waters; that such riparian

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rights rest upon the title to the bank or shore, and not upon the title to the soil under the water.

The only theory which seems at all debatable to justify the views of the majority as to a contingent interest is that the government released and abandoned all claim to the island by not having originally surveyed it, although it was designated as an island on the plat and was mentioned several times in the field notes. It may have been considered too small to warrant a survey, but how does that fact indicate an intention on the part of the government to relinquish all title in favor of the shore land? If we are to adhere to the doctrine that the riparian owner is limited to the shore line of navigable waters, with the incidental right of access, etc., I am unable to see upon what theory the government should be held to have abandoned its claim to the island in question merely because it was not included in the original survey. And, if such was the effect at that time, the government afterwards asserted its claim, had the island surveyed, and recognized the title of defendants' grantors. At the time the government so took possession of the island in 1885, had it surveyed, and permitted defendants' grantors to take possession and acquire title thereto, plaintiff had never asserted any right, title, or interest therein. The island in no manner originally entered into the computation to make up the number of acres applied for by him as a homestead. It was never treated either by him or the government as a part of his original claim.

On the other hand, as the evidence discloses, for a number of years plaintiff had acquiesced in the subsequent assertion of title by the government and those who settled thereon. While such acquiescence may not in law amount to an estoppel, it indicates very fully that up to that time, at least, plaintiff never asserted upon any ground whatever that he was entitled to the same. As bearing upon the question of title to islands under similar circumstances, the following cases may be considered: Steinbuchel v. Lane, 59 Kan. 7, 51 Pac. 886; People v. Warner, 116 Mich. 228, 74 N. W. 705; Bonewits v. Wygant, 75 Ind. 41; Harding v. Minneapolis Northern Ry. Co., 55 U. S. App. 257, 84 Fed. 287, 28 C. C. A. 419. The last-named case was one involving title to a part of an island in the Mississippi river at Minneapolis, and has an important bearing upon the question under discussion. My

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view is that, if the government claimed the island before it was acquired by plaintiff by recession of the waters, and defendants' grantors acquired title direct from the government before the alleged contingent interest in plaintiff became vested, they cannot be divested simply because subsequently a sand bar appeared, connecting the island with plaintiff's land.

A new trial should be granted.

STATE v. H. BURTON STRAIT.[1]

SAME v. HENRY SCHREINER.

March 24, 1905.

Nos. 14,252, 14,253—(230, 231).

Criminal Law—Examination of Bankrupt's Trustee.

In a criminal prosecution against a private banker for receiving deposits when his bank was insolvent, where such banker has made a petition in bankruptcy and his books had been turned over to the trustee, *held*, that such trustee with the books might be examined before the grand jury upon an investigation of the affairs of the bank, and that such examination did not involve any unlawful use of his private papers in violation of his constitutional rights.

Grand Jury.

It is within the sound discretion of the trial court to excuse members of a grand jury from sitting in the hearing of a matter being considered by that body, where, in its judgment, such juror would not be impartial and asks to be excused, although not challenged by the accused.

Defendants having been separately indicted in the district court for Scott county for accepting money on deposit in the Scott County Bank at a time when the bank was insolvent, moved severally to quash the indictments on the grounds set forth in the opinion. The motions were heard before Cadwell, J., who made orders denying the same and

[1] Reported in 102 N. W. 913.

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thereafter, upon request of defendants, certified the cases to the supreme court for determination of the questions involved. Orders affirmed.

F. J. Leonard, County Attorney, for the State.

It was not error to use the books, papers and records of the defendants as evidence before the grand jury, the defendants being both bankrupts and the books, papers and records being in the possession of their trustee in bankruptcy. The evidence was competent. Thompson & M. Jur. § 642; Underhill, Crim. Ev. § 26; 1 Bishop, Crim. Proc. § 872, subd. 5; Clark, Crim. Proc. §§ 112, 113; Hughes, Crim. L. & Proc. § 2695; People v. Molineux, 58 N. Y. S. 155; Buchanan v. State, 41 Tex. Cr. App. 127. If the evidence be competent, it matters not by what means the evidence is obtained. Legatt v. Tollervey, 14 East, 302; 1 Greenleaf, Ev. § 254a; State v. Mathers, 64 Vt. 101; Commonwealth v. Dana, 2 Metc. (Mass.) 329; Commonwealth v. Tibbetts, 157 Mass. 519; Trask v. People, 151 Ill. 523; Cluett v. Rosenthal, 100 Mich. 193; Starchman v. State, 62 Ark. 538; State v. Griswold, 67 Conn. 290; Commonwealth v. Smith, 166 Mass. 370; State v. Pomeroy, 130 Mo. 489; Scott v. State, 113 Ala. 64; State v. Salverson, 87 Minn. 40.

Charles R. Fowler and *Edward H. Crooker,* for defendant Strait; *H. J. Peck* and *A. J. Edgerton,* for defendant Schreiner.

The court erred in denying defendants' motions to quash and set aside the indictments for the reason that through the compulsory process of the court, directed to Fred Habegger, defendant's trustee in bankruptcy, defendant's books of account, records and papers which were in said Habegger's possession solely as an officer and arm of the court, were produced, offered and introduced in evidence before the grand jury which returned the indictment, without defendant's consent, and defendant was thereby by process of court compelled to be a witness against himself before said grand jury. Amendments 4 and 5 to the constitution of the United States guaranty to a citizen of the United States freedom from unlawful seizures and searches, and also provide that in a criminal case a man shall not be compelled to be a witness against himself. The fifth amendment is applicable as well

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to the books and papers of the person as to his verbal declarations as a witness. Boyd v. U. S., 116 U. S. 616; Johnson v. Donaldson, 18 Blatch. 287; In re Pacific Ry. Comm., 32 Fed. 241; Blum v. State, 94 Md. 375; People v. Swartz, 8 Am. Bankr. Rep. 487.

The question is not was incompetent evidence received by the grand jury; but were defendants' constitutional rights infringed by order or process of the court. The evidence here complained of was not procured by the trespass, force, fraud or deceit of persons not under the direction or control of the court. It was procured by subpœna issued for that purpose by this court in this proceeding, for use in this proceeding, directed to one who was lawfully in possession under authority and as an officer of another (the federal) court, for a special purpose. The evidence was procured by the exercise of the sovereignty of the state, as exercised by the court, to compel defendants to be witnesses against themselves, and is a violation of constitutional rights of which the courts will take notice. The constitutional prohibition is directed not to individuals, but to the federal and state governments, and acts on those branches of said governments which exercise sovereign power. This is the distinction between the case at bar and those cited by the state. State v. Griswold, 67 Conn. 290; Gindrat v. People, 138 Ill. 103. The proper distinction is well illustrated by comparison of the two following cases: Rosenthal v. Dickerman, 98 Mich. 208; Cluett v. Rosenthal, 100 Mich. 193. The evidence was offered as defendants' admissions made in and for the purposes of the bankruptcy proceedings, and its use in a criminal case is prohibited by the bankruptcy acts. 30 St. 548, § 7. This prohibition applies as well to the state courts. Brown v. Walker, 161 U. S. 591, 606; Easton v. Iowa, 188 U. S. 220. And the reason for such prohibition is the manifest and public inconvenience which would result from a contrary rule.

LOVELY, J.

This cause is certified here by the district court for Scott county after its refusal to quash and set aside indictments against defendants in view of the importance of the questions submitted.

Defendants Henry Schreiner and H. B. Strait were partners engaged in private banking business at Jordan under the name of the

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Scott County Bank. Indictments were returned against each for having received specified sums of money when the establishment they were conducting was alleged to be unsafe and insolvent, contrary to chapter 219, p. 504, Laws 1895. Upon arraignment defendants moved to set aside the indictments upon the ground that the same were illegally found and returned. This contention was supported by affidavits, which, so far as material here, disclose the following undisputed facts: Defendant Strait, by a voluntary petition in bankruptcy, sought the protection of the federal court. A receiver was first appointed, and such proceedings were thereafter had that the assets, with the books and papers of the Scott County Bank, were turned over to a trustee (Fred Habegger), who in this way had possession thereof.

An investigation of the affairs of the bank was instituted at the October, 1904, term of the district court for Scott county, though neither Strait nor Schreiner was under recognizance to appear. A subpœna was issued to the trustee, Habegger, personally to attend before the grand jury, where he brought the books and papers of the bank at the request of the prosecuting attorney. Indictments were returned severally against Schreiner and Strait, when it was moved in behalf of Schreiner, and afterwards of Strait, to set aside the same upon the ground that the use of the books and papers of the bank in the hands of Habegger was improper, and thereby infringed defendants' constitutional rights as citizens secured by section 7 of article 1 of the state constitution, which provides that no person shall be compelled in any criminal cause to be a witness against himself, and by section 10, which provides that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated."

While it would not be proper to disclose testimony received before the grand jury, and it would ordinarily be presumed that material evidence only was introduced, yet we are not inclined, in view of the probable consequences of our decision at the trial of the cause, to avoid the questions raised whether the use of the trustee and the books of the bank was in defiance of the constitutional rights secured to the citizen under the organic law of the state, particularly since it has been regarded as of importance by the trial court.

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In State v. Gardner, 88 Minn. 130, 92 N. W. 529, we held that a defendant in a criminal case should not be compelled to go before the grand jury in violation of the guaranty referred to, and give evidence either directly or indirectly against himself, or tending to affect his rights upon an indictment founded thereon. The immunity belonging to the defendant invoked for his benefit in that cause was personal, and our decision went no further than to hold that it was an infringement of his rights in violation of the plain letter of the constitution, which invalidated the indictment returned.

In the case of Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, where under an act of Congress proceedings in rem were instituted to establish a forfeiture of goods alleged to have been fraudulently imported without paying the duties thereon, it was held that an order of the court made under the act referred to requiring claimants of the goods to produce an invoice in court for inspection of the government attorney (to be offered in evidence by him, or to be taken as admitted) was an unconstitutional exercise of authority; and this is as far, upon investigation, as we are able to discover any interpretation of these safeguards in our American jurisprudence protecting private papers from search or seizure or the individual from being compelled to answer incriminating interrogatories. As we understand this decision, the objection to be of potential force must directly involve the action of the court in using compulsory means to obtain evidence which deprives the accused of the protection which is personal to him and to his private papers directly involved. It may be well to state that the court say in their opinion in this case that by the proceeding under consideration the court was attempting to extort from the party his private papers and books, and to make him liable for a penalty or forfeiture of his property.

In the case at bar no subpœna or process to produce the books of the bank was directed to the defendants, or authority exerted to obtain their possession from the person in whom their custody was originally held. No objection appears to have been made to the delivery of the books to the receiver or trustee in bankruptcy. Records and documents which were of their nature quasi public were made subject to the inspection of the court for an investigation of the affairs of the bank to determine the rights of the defendants and their

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creditors. If there was any immunity attached to the books by reason of the fact that they tended to show incriminating circumstances, the accused parties were not interrogated with reference to the same, or under the control of any court or compulsory process required to produce them for use.

It cannot, upon reasonable grounds, be justly claimed that courts will institute an inquisition upon the means by which documentary testimony is obtained, even though evidence may have been illegally taken from the possession of the party against whom it is offered or otherwise unlawfully obtained. This is no valid objection to their admissibility if they are pertinent to the issue. 1 Greenleaf, 325n. Defendants rely upon the case of Blum v. State, 94 Md. 375, 51 Atl. 26, to support their contention, and to a considerable extent it does so; but we are not prepared to accept the reasoning nor the conclusions of the court in that case. It assumes to follow the decision of Boyd v. U. S., supra, and rests upon analogies it discerns therein; but a comparison of these two cases will show that they are clearly distinguishable and that the immunity which was sought to be enforced in the federal case applied to the direct authority of the court to compel a production of private papers against the protest and opposition of the parties affected thereby.

So far as the facts in the case at bar are concerned, the books and papers were to a certain extent of a public nature, containing, doubtless, accounts of depositors to a large extent, which came into the hands of a trustee in bankruptcy. No objection was made to the use of them by the defendants. They were in fact surrendered to the trustee for all legal uses. Although it was said to have been without their knowledge, yet it will not be implied that whatever would be injurious to an accused person would be in opposition to his wishes, or require that the court should assert his rights, or on that ground that the court would forbid its production in the ordinary and legal course of administration of law instituted, as here, by a voluntary proceeding of accused, whereby the same went into the hands of the agent of the court for inspection, and the defendant's personal rights were not interfered with, or the security of his papers violated, in the sense which would invoke the protection of the constitutional guaranty relied upon by the defendants. We are of the opinion that

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investigation, so far as the claim of the defendants is concerned, was within the scope of legitimate inquiry, and the views of the trial court in this respect are correct.

When the district court convened there was a full complement of grand jurors, twenty three in number. Three were excused by the court on account of being over age; still another was excused without any reason appearing therefor; another was excused on account of being related to Henry Schreiner, when the panel returned into court and reported that they had disposed of their business except the cases of the state against Schreiner and Strait. Five members of this panel so reported severally asked to be excused on the ground that each was a depositor in the Scott County Bank, which failed in November, 1903, and, each being sworn, so testified, when it was ordered by the court that such grand jurors be excused, when it appeared to the court that there was a deficiency, there being only thirteen remaining when sixteen were necessary, at least, for a quorum; whereupon a special venire was issued to the sheriff requiring him to summon ten electors to appear forthwith to supply the deficiency, which was done. The special venire was returned within due time with the names of ten persons appearing thereon who were sworn, and added to the panel, when the entire grand jury retired to perform their duties, and in due time returned the indictments which are made the subject of this review.

It is now claimed on the part of defendants that the grand jury as newly formed and constituted in the manner stated was an illegal body; that ten of their number had no right to participate in its proceedings, and such participation invalidated every act of the body itself. It is insisted that the authority of the court to excuse a member of the grand jury is to be found in section 7181, G. S. 1894, which reads as follows:

> The court shall not excuse from service upon either the grand or petit jury any person duly drawn and summoned to serve thereon, except upon the ground that the person so summoned and seeking to be excused is either physically or mentally unable or unfit, in the opinion of the court, to attend or serve as a juror,

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or by reason of serious sickness of some immediate member of the family of the person so summoned.

This is a general provision, applying to all juries, and cannot be construed literally to limit the discretionary powers of the court, but more properly to apply to such excuses as jurors may offer themselves when seeking to be relieved from duty. The word "shall" in this section, as is often the case, is to be construed as if it were permissive, rather than mandatory, for it must be obvious that there are many reasons why a juror may be excused by authority of the court in cases not mentioned—as of his own sickness—and in turning to causes for challenge of a juror in sections 7190 of this chapter, where such challenges are interposed by an accused party under recognizance, the authority of the court to excuse a juryman who is biased and cannot act impartially is clearly recognized in the sixth subdivision of such section. We have no doubt but that in the orderly conduct of the business of the court in the formation and submission of matters to a grand jury the trial court is clothed with reasonable judicial discretion to excuse jurors, and that the court is not to be deprived of such authority because the legislature has seen fit to declare one or more grounds of excuse for relieving such juror from service. Thompson & M. Jur. § 580.

Had the defendants appeared and objected to jurors because they had been depositors in the Scott County Bank, and were therefore presumably biased against them, and the court had discharged them on that account, no objection could have been justly made to its course in that respect; certainly the defendants could not have been prejudiced by its action. Neither could they have been prejudiced by the independent action of the court, though no challenges were interposed by either defendant. In other words, its acts were judicial, not arbitrary, and tended to promote a fair consideration of the rights of the accused persons. Had the trial judge, upon no grounds except a manifest purpose to set aside one jury and to supplant it with another, taken the action criticized, another question would be presented, but the course pursued was considerate, and, we think, clearly discretionary.

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We are of the opinion that the orders of the trial court were within the line of its judicial duties, and must be sustained.

Orders affirmed.

F. M. LOOMIS v. CHARLES WALLBLOM and Another.[1]

April 7, 1905.

Nos. 14,094—(191).

Bankruptcy—Discharge of Partner.

A full discharge of individual liability of one partner on a firm debt may be had in bankruptcy proceedings concerning that partner only.

Defense to Action on Judgment.

Such discharge is a good defense in an action brought against two partners to renew a judgment on a partnership debt, the process in which action was served only on the partner who had been duly discharged in bankruptcy proceedings, where it appeared that many years before the parties had dissolved the firm, and the firm had, to the actual knowledge of the judgment creditor, made an assignment of all unexempt firm and individual property under a state insolvency law, and where it did not affirmatively appear that any firm assets now exist, and where it appeared that the claim was properly scheduled, and notice thereof was duly given.

Filing of Claim.

Held, that the claim was duly scheduled on the facts here presented.

Action in the district court for Ramsey county against defendants Charles Wallblom and John Thorsell, as partners as Wallblom & Thorsell to recover $263.76, and interest, upon a judgment. Defendant Wallblom was alone served with summons and alone appeared and answered, pleading in bar a discharge in bankruptcy. The case was tried before Kelly, J., who found in favor of defendant. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

James E. Trask, for appellant.

Otto Kueffner, for respondent.

[1] Reported in 102 N. W. 1114.

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JAGGARD, J.

On November 27, 1893, defendants, partners doing business as Wallblom & Thorsell, executed a deed of assignment under the state insolvency law, both as individuals and as partners, of all their unexempt property, which was filed in the district court of Ramsey county. The National Wall Paper Company filed and proved its claim in the assignment matter, but did not file a release, and received no dividend. In March, 1895, it brought an action against Charles Wallblom and John Thorsell, as copartners doing business as Wallblom & Thorsell, in the district court of Ramsey county, alleging in its complaint the sale of goods of the value of $254.77, and default in payment. There was no allegation that the goods were sold to the firm or purchased for partnership purposes. Default was made, and judgment entered on April 9, 1895, against "Charles Wallblom and John Thorsell, as copartners doing business as Wallblom & Thorsell, and each of them." On August 4, 1898, Charles Wallblom filed his individual petition in bankruptcy, and was on August 5 adjudged a bankrupt. The claim of the National Wall Paper Company was listed as follows: "National Wall Paper Co., Chicago, Ill. $254.77. Consideration, goods bought." On December 19, 1898, Charles Wallblom was discharged from all his debts. This plaintiff, as assignee of said judgment, thereafter brought this action to renew the judgment hereinbefore set forth. Defendant Wallblom answered, setting up his discharge in bankruptcy as a defense. The reply does not deny actual notice of the bankruptcy proceedings on the part of the National Wall Paper Company, but denies that notice was given to the partnership creditors. It does not appear that defendant John Thorsell was served or appeared in the proceeding. Upon the trial it was admitted that copartnership of Wallblom & Thorsell ceased to do business in 1893, and that the partnership was dissolved so far as it could be done by the acts of the partners. The debt here sued upon was not paid or discharged. The court found that notice had been given to all creditors whose claims were scheduled, and ordered judgment in favor of Wallblom upon the merits. From an order denying plaintiff's motion for a new trial, this appeal was duly taken.

Plaintiff's assignments of error involve the determination of this question, namely: Did the court err in holding as a proposition of law

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that the individual discharge in bankruptcy of Wallblom released him from the claim here sued upon?

1. The answer to that question depends, in the first place, upon a construction of the bankruptcy act. The certificate of discharge recited that the bankrupt had conformed to all the requirements of law in that behalf. The court thereby decreed that the bankrupt be

> Forever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the 4th day of August, 1898, on which day the petition for adjudication was filed by him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy.

There is no claim that the discharge was invalid by reason of any of the things mentioned in chapter 3, §§ 14 and 15, of the bankruptcy act of July 1, 1898, c. 541, 30 St. 550 [U. S. Comp. St. 1901, 3427, 3428]. The discharge did not purport to forever release the bankrupt from all his debts and liabilities, but only from all such "debts and claims" as were by said bankruptcy act "made provable against his estate." That the debt was one which might have been proved in bankruptcy proceedings against the estate of the individual partner is evident from the whole tenor of the law, and especially from c. 1, § 1, 30 St. 544 [U. S. Comp. St. 1901, 3418], chapter 3, §§ 4, 5, of that law, 30 St. 547 [U. S. Comp. St. 1901, 3423, 3424]. See also section 16, 30 St. 550 [U. S. Comp. St. 1901, 3428]. Indeed, subdivision "g" of said section 5 expressly provides that

> The court may permit the proof of the claim of the partnership estate against the individual estates and vice versa and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

The history and present status of this case differentiate it from any authority to which our attention has been called, or which a careful search has enabled us to find. Collier, Bankr. (5th Ed.) § 5a, p. 74. The partnership ceased to do business, and had been dissolved so far as the parties could dissolve it, in 1893. Moreover, in that year, by

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general assignment under the state insolvency law, the partners conveyed all their unexempt individual and firm assets to an assignee. The plaintiff has not made it appear that any such firm assets now exist. This court will not presume that they do. This case therefore does not involve any question of marshaling assets, nor of the right of the plaintiff against the firm assets or the other partner. Defendant Wallblom alone appears to have been served with summons in this action. The question here presented to this court affects the judgment against him alone. It is also to be borne in mind that this is not an objection to the entry of a decree of discharge, but only to the right of plaintiff to renew or extend this judgment.

The entry of the judgment materially affected the nature of the claim on which it was based, so far as these proceedings are concerned. It might be that in certain contingencies this court would examine that judgment for the purpose of ascertaining what the original contract was. Such a proposition is, however, academical in this case. When the judgment was entered it became a lien on any unexempt real estate within the county where the judgment was docketed which belonged to the defendant and respondent Wallblom, and the creditor became entitled to appropriate new rights and remedies against him in consequence. So far as this case involves that judgment, the original cause of action was merged therein. In McKittrick v. Cahoon, 89 Minn. 383, 95 N. W. 223, this court held that where, by an order in bastardy proceedings, the putative father of a natural child was required to pay a monthly stipend for its support, and upon refusal a final money judgment was obtained for the total amount due, the rights of the person entitled to recover under the order of filiation were merged in the judgment, and the debt evidenced thereby was not excepted from the operation of the bankruptcy act of 1898, § 17, although the claim on which the judgment was based, standing by itself, would not have been discharged.

Such a judgment as the one here sought to be extended, filed in the bankruptcy proceedings, might, under appropriate conditions, have been paid in full or in part by the application thereto of the whole or a proper part of the funds in the hands of the respondent's trustee in separate bankruptcy proceedings. Its full discharge as an individual liability on a firm debt may accordingly be had in bankruptcy proceed-

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ings. Jarecki Mnfg. Co. v. McElwaine, 107 Fed. 249; Curtis v. Woodward, 58 Wis. 499, 17 N. W. 328. Collier in his note to In re Freund, 1 Am. Bankr. Rep. p. 31, says: "Both on principle and by the weight of authority it would seem to be law that a discharge granted to one member of the firm releases him from all his provable debts and liabilities, both from those incurred individually and from those incurred as a member of the partnership. The few cases which held to the contrary under the former act seem to have been based upon a misconception of the extent of the rights of an assignee in the bankrupt's property, and as to the effect upon the firm of the bankruptcy of one member."

In Re Meyers (D. C.) 96 Fed. 408, relied upon by plaintiff, upon an objection to discharge on the ground of fraud, there were independent and merely individual proceedings by the two partners. The petition asked for discharge of both individual and partnership debts. Brown, J., said (page 411): "No adjudication of the firm as a bankrupt is asked, nor could such an adjudication be made without a formal application therefor, and the presence of both partners in the same proceedings. Where there are absolutely no firm assets, separate proceedings may be valid, and a discharge of each partner separately may possibly be had, because the firm debts are several as well as joint." Plaintiff also relies largely upon In re Mercur, 122 Fed. 384, 58 C. C. A. 472. That case involves an obviously different state of facts, and is in its reasoning not of necessity entirely inconsistent with the rule here applied.

In the early history of partnership law, the courts fell into the habit of speaking of a partnership as "a separate entity." The inaccuracy and impropriety of such nomenclature was so clearly and repeatedly demonstrated as to lead to its substantial abandonment. Recent decisions on the marshaling of assets under the present bankruptcy law have led to the undesirable resurrection of the phrase. Its misleading and ambiguous character is well illustrated by the subtleties of appellant's brief, and by his use of it as a justification for a fallacious conclusion derived by unwarranted deductions from a fiction of law. His argument commands admiration for its ingenuity and industry, but compels the conviction that its result would be a plain perversion of the letter and purposes of the bankruptcy law. The learned trial

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court properly held that the discharge in bankruptcy operated as a full defense.

2. The most serious question in this case is this: Was the indebtedness properly scheduled, so as to give notice to the plaintiff's assignor? This question must also be answered in the affirmative. In the schedule, the name of the original debtor, the nature and the amount of the original debt, are correctly stated. The evidence shows that respondent owed the creditor no other debt. Notice was properly given.

Order affirmed.

CHARLES CORBET v. TOWN OF ROCKSBURY.[1]

April 7, 1905.

Nos. 14,144—(204).

Real Estate Taxes.

Statutory provisions concerning the various official acts which result in the production of a tax to be collected are directory, and not mandatory.

Errors in List.

Mere official errors or omissions appearing in an assessor's list of taxable real estate, however obvious, do not necessarily invalidate that list.

Evidence of Assessed Valuation.

In this case *held*, that an assessor's list of taxable real estate within a given township is admissible in evidence to show assessed valuation of land therein, although the name of that township may be incorrectly stated in some places, and misstated in others; and although such list includes lands not within that town, and omits other lands comprised within its territory; and although interlineations to make it conform to action of boards of equalization appear therein; and although its jurat, signed by the assessor, be not signed and sealed by the county auditor—when lands within its legal limits are correctly described by government subdivisions, and the townships are correctly named in places, so as to render its territory susceptible of easy ascertainment by reference thereto in connection with the minutes of the board of county commissioners organizing it and changing its territory.

[1] Reported in 103 N. W. 11.

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Township Bond.

A bond, in the hands of a bona fide purchaser for value, issued by a township under a statute prescribing a public record as determinative of the amount of authorized issue, which on its face exceeds the limit of the entire issue proper under such record produced, is void as to such excess notwithstanding recitals therein of compliance with all legal requirements and the payment of instalments of interest thereon.

Action in the district court for Red Lake county to recover from defendant $600 and interest upon twelve interest coupon notes attached to three bonds issued by defendant. The case was tried before Watts, J., who made findings of fact and as conclusion of law found that plaintiff was entitled to recover $144.16 and interest. From a judgment entered pursuant to the findings, plaintiff appealed. Affirmed.

A. A. Miller and *Burke Corbet,* for appellant.

Martin O'Brien, H. Steenerson, and *Charles Loring,* for respondent.

JAGGARD, J.

Pursuant to chapter 135, p. 277, Sp. Laws 1883, the town of Rocksbury, of Polk county, Minnesota, issued on August 8, 1883, certain bonds, which certified and recited that

> All acts, conditions and things required to be done precedent to and in issuing of said bonds have been properly done, happened and performed, in regular and due form as required by law.

These bonds are in the sum of $500 each, payable on August 8, 1903, together with interest thereon at the rate of ten per cent. per annum, payable annually. The principal and four years' interest coupons are unpaid. Plaintiff and appellant is the bona fide purchaser in due course of business, for a valuable consideration, before maturity, of three of these bonds, and has received payment of a number of interest instalments. He brought this action for four years' unpaid interest. The defendant and respondent township set up the defense that without authority in law its authorities had issued these bonds in excess of ten per cent. of the assessed valuation of the territory of the township as it existed at the time the bonds were issued, and that they were therefore void as to the excess. Upon the evidence introduced the court found that the issue of bonds was in excess of

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the lawful limit of ten per cent., held the bonds in suit invalid as to such excess, and ordered judgment for that portion of interest accrued which corresponded to the amount of principal and interest for which the bonds might lawfully have been issued, in accordance with the defendant's contention. From a judgment on this order, plaintiff duly appealed.

1. The first of the two questions on which the decision of this case rests, as both counsel agree, is this: Was the assessment roll of the town of Rocksbury, offered by the defendant to show its assessed valuation, properly received in evidence by the court, or should the objections of the plaintiff thereto have been sustained? The grounds of objection were clearly and sufficiently stated by counsel for the plaintiff, namely, that the assessment roll showed on its face that it was not the assessment roll of the township of Rocksbury, and that it was not the legal assessment roll of any town whatever. The question thus presented involves many difficulties, and is not susceptible of an entirely satisfactory answer.

In this state the proceedings to collect taxes are judicial in character. In consequence, most errors or omissions, informalities and imperfections, in performance of official duty, do not invalidate taxing records, nor destroy the right to collect the tax, unless they result in demonstrated and substantial prejudice. It is elementary that the statutory provisions with reference to the steps which produce a tax are, in general, directory, not mandatory.

The assessment roll in this case would have been sufficient in law against an objection to the enforcement of the tax on the ground that no assessment had been levied. The records of the board of county commissioners, which were introduced, sufficiently show that the town of Rocksbury consisted of township 153, range 43, and of township 154, range 44. The misnomer of Rockstad township instead of Rocksbury township, appearing on the cover, would not have been material, inasmuch as on the same cover there also appeared these two townships by number of township and range, although other townships also appeared.

The error in the direction to the assessors, referring to the town of Blaine, or the heading on the first page of the tabular statement referring to the town of Blaine, or in the return as of town of Rock-

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stad, would not render the list invalid because of the correct naming of the township of Rocksbury on two other pages, and because of correspondence between the land described in the columns of these three pages, and the territory comprised in Rocksbury township as the same appears in the duly admitted records of the board of county commissioners.

The interlineations in the column entitled "Value of Land Exclusive of Structures and Other Improvements" correspond to the alterations made by the equalizing board, under G. S. 1894, §§ 1554–1556, would not invalidate. Alike in states collecting taxes by judicial proceeding, and even in states collecting taxes by summary proceedings, the failure of the auditor to sign the jurat under the signature of the assessor to the assessment list is by the weight of authority held not to avoid that record. Frost v. Flick, 1 Dak. 131, 46 N. W. 508; Farrington v. New England, 1 N. D. 102, 45 N. W. 191; Avant v. Flynn, 2 S. D. 153, 49 N. W. 15 (a leading case, discussing the Wisconsin authority cited post); Wood v. Helmer, 10 Neb. 65, 4 N. W. 968; South Platte v. City, 11 Neb. 344, 7 N. W. 859; McClure v. Warner, 16 Neb. 447, 20 N. W. 387; Merriam v. Dovey, 25 Neb. 618, 41 N. W. 550; Twinting v. Finlay, 55 Neb. 152, 75 N. W. 548; Spiech v. Tierney, 56 Neb. 514, 76 N. W. 1090; Moore v. Turner, 43 Ark. 243; Equalization Board v. Landowners, 51 Ark. 516, 11 S. W. 822; Stell v. Watson (Ark.) 11 S. W. 822; Challiss v. Board, 15 Kan. 49; Duggan v. McCullough, 27 Colo. Sup. 43, 59 Pac. 743 (under construction of statute). And see Dayton v. Board, 33 Ore. 131, 50 Pac. 1009.

The Wisconsin cases, considered as a whole, are not inconsistent with this rule. Avant v. Flynn, supra. See Scheiber v. Kaehler, 49 Wis. 291, 5 N. W. 817; Marsh v. Board, 42 Wis. 502; Power v. Kindschi, 58 Wis. 539, 17 N. W. 689; Fifield v. Marinette, 62 Wis. 532, 22 N. W. 710; Wisconsin v. Lincoln, 67 Wis. 478, 30 N. W. 619. But see contra, Pike v. Martindale, 91 Mo. 268, 1 S. W. 858; State v. Cook, 82 Mo. 185; State v. Phillips, 102 Mo. 664, 15 S. W. 319; Burke v. Brown, 148 Mo. 309, 49 S. W. 1023. And see Thompson v. City of Detroit, 114 Mich. 502, 72 N. W. 320.

That there existed an assessment roll, valid in law, showing the valuation of land in the town of Rocksbury, may not alone be sufficient to constitute notice of the valuation of assessable property within

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that town. It is, however, exceedingly significant. That significance is not destroyed by the fact that the assessment list does not affirmatively show that all lands in township 154, range 44, were assessed, nor by the fact that it includes also other lands not in the township of Rocksbury. The omission of land may have been necessary because of exemptions, or for other reasons. The law will not presume official error. The inclusion of other lands would help, and not hurt, the plaintiff, because it would increase the amount of assessed valuation. The assessment roll was shown to be the record of the county in which the defendant township was situated, and to be the only one for the territory comprised within the legal limits of that township.

Taking the assessment list as a whole, in the light of all facts, presumptions, and rules of statutory construction of law, we are of opinion that it was sufficient to give notice to an ordinarily prudent person proposing to purchase bonds under the circumstances of this case. Reasonably followed, inquiry would have easily resulted in knowledge of actual valuation. This was the proper book by the means of which to determine the valuation of the property, and therefrom the limitation of indebtedness. Johnston v. Board of Co. Commrs. of Becker County, 27 Minn. 64, 6 N. W. 411. Mathematical calculation from that list of each tract of land by township and range showed the assessment of respondent town, as equalized by the board, to be $3,605. This was the basis for taxation, and controls in this case. A bond issue of $360.50, and not more, would have been justified. Therefore each bond exceeded on its face the amount allowed by statute.

2. The second question upon which the decision of this case rests is this: Granting that the issue of the bonds in question was unauthorized, and in excess of ten per cent. of the valuation of defendant town, yet by reciting on the face of the bonds compliance with the legal requisites, and by paying the interest on said bonds for twelve years, is the defendant estopped from now repudiating its obligation in the hands of the present owner?

In Gunnison Co. Commrs. v. Rollins, 173 U. S. 255, 19 Sup. Ct. 390, Justice Harlan reviews the leading cases decided by the supreme court of the United States on this subject. From that opinion and the cases therein cited it appears, as counsel for the defendant has very

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clearly pointed out, that there are three classes of cases in this connection: (1) Those in which the bonds, issued where there is an entire lack of power in the municipality, are held invalid despite recitals of authority or payment of interest; (2) those in which bonds, issued under powers granted, but legally issuable only when certain prerequisite conditions like petition or election are complied with, may be validated; (3) those in which authority is given to municipalities to issue bonds to a limited percentage of its assessed valuation or otherwise. This third class of cases is further subdivided by the authorities into two classes, namely: (a) Cases where constitution or statute prescribe that designated public officials shall determine the question as to whether or not the bonds exceed the limit prescribed; and (b) cases wherein the authority for the issuance of the bonds designates the record which is to determine the question whether or not the issue of bonds exceeds the amount authorized.

The bonds here in controversy belong to this last subdivision. The act under which the bonds were issued expressly provided (section 1) that such bonds should not exceed

> Ten per centum of the taxable valuation of real estate in such town according to the assessment roll of the preceding year.

The certificate of the county auditor as to the sufficiency of assessable property was unauthorized, and has no legal effect on the questions here determined. Croswell v. Benton, 54 Minn. 264, 55 N. W. 1125; Daviess Co. v. Dickinson, 117 U. S. 657, 6 Sup. Ct. 897.

Inasmuch as this court has held that the assessment roll was properly received in evidence, and inasmuch as the face of each bond exceeded the total amount of bonds properly issuable, it follows that the bonds are void as to the excess above the limitation shown thereby. Board of Co. Commrs. v. Rollins, supra; Buchanan v. Litchfield, 102 U. S. 278, 289; Sutliff v. Lake County Commrs., 147 U. S. 230, 13 Sup. Ct. 318; City of Columbus v. Woonsocket, 114 Fed. 162, 52 C. C. A. 118; Schmitz v. Zeh, 91 Minn. 290, 97 N. W. 1049.

Judgment affirmed.

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AUGUST JEPPSON v. CHARLES ALMQUIST.[1]

April 14, 1905.

Nos. 14,187—(10).[2]

Highway.

Action of trespass, in which the defense was that the locus in quo was a public highway. *Held*, that the evidence does not justify the finding and decision of the trial court that the place was not a public highway.

Appeal by defendant from a judgment of the district court for Dakota county entered pursuant to the findings and order of Crosby, J. Reversed and new trial granted.

W. H. Gillett, for appellant.

Hodgson & Lowell, for respondent.

START, C. J.

This is an action of trespass, originating in a justice court of the county of Dakota. It appearing on the trial from the evidence that the cause was one involving the title to real estate, it was certified to the district court of the county of Dakota. The complaint alleged that the plaintiff was the owner of the East ½ of the Northeast ¼ of section 29, township 114, range 16, and that on November 12, 1902, the defendant unlawfully and forcibly entered upon the land, and cut down a portion of the fence inclosing the same, to the damage of the plaintiff in the sum of $25. The answer alleged, in effect, that the plaintiff's land was subject to the easement of a public highway, that the place where the alleged trespass was committed was within the limits of the highway, and, further, that the defendant removed the fence in question from the highway in discharge of his duty as a public officer. The trial of the cause, which was by the court without a jury, resulted in findings of fact and conclusions of law to the effect that no part of the land was subject to the easement of a public highway, that the defendant unlawfully removed the fence, to the plaintiff's damage in the sum of one dollar, and that judgment accordingly be entered for him. It was so entered, from which the defendant appealed.

[1] Reported in 103 N. W. 10.

[2] April, 1905, term.

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The record presents only one question, namely, does the evidence justify the finding and decision that the locus in quo was not a public highway? We answer the question in the negative. No claim was made by the defendant that any highway was ever legally laid out by the formal action of the public authorities, but it is claimed by him that the undisputed evidence shows a highway by a common-law dedication, and also by adverse public use and repair thereof for more than the statutory period of six years.

The evidence, which was practically undisputed, establishes these facts: The alleged highway starts at a point in a public highway near the center of the west line of the southwest quarter of section 29 in the township of Ravenna, in the county of Dakota (Township 114, Range 16); thence running diagonally in a northeasterly direction through the plaintiff's land; thence to Etter, which is a railway station located at the mouth of a ravine in section 24 of the same town, and contains a church, schoolhouse, postoffice, station house, and other buildings; that the alleged highway is a continuous road, and has been traveled by the public for more than twenty-five years; that the plaintiff's land where the road crosses it is sandy, and somewhat barren, and until recent years was unoccupied; that prior to fifteen years ago the travel did not follow in the same track over the plaintiff's land, but for more than fourteen years last past the travel has followed in a single well-defined roadway; that during such fourteen years the highway has been continuously traveled by the public along such track without interruption or objection except that on July 3, 1902, a fence was built across the road by direction of the owner of the land; that the defendant, then one of the supervisors of the town, ordered the fence to be removed; the order was not complied with, and on November 12, 1902, the defendant removed the fence from the highway as an obstruction therein; and, further, that for at least six years next before the building of the fence the alleged highway had been kept in repair and worked and continually used and traveled as a public highway, but relatively only a small amount of the work was done on the part of the supposed highway which was on the plaintiff's land; such work was done on such parts of the road as was reasonably necessary to accommodate the travel over it.

The clear inference from these facts is that the place of the alleged

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trespass was a public highway by both a common-law and statutory dedication thereof. Wilder v. City of St. Paul, 12 Minn. 116 (192); Morse v. Zeize, 34 Minn. 35, 24 N. W. 287; Ellsworth v. Lord, 40 Minn. 337, 42 N. W. 389; Klenk v. Town of Walnut Lake, 51 Minn. 381, 53 N. W. 703; Hansen v. Town of Verdi, 83 Minn. 44, 85 N. W. 906. It is true, in determining whether there was such a dedication, the character, situation, and value of the land, and the manner and extent of the public travel across it, must be considered. But the extent and manner of the uninterrupted public use, travel, and repair of the alleged highway for the past fifteen years were such, in our opinion, as to require a finding that the locus in quo was a public highway.

It follows that the finding of the trial court to the contrary is not sustained by the evidence, and that the judgment must be reversed, and a new trial granted. So ordered.

Judgment reversed and new trial granted.

C. A. BUIE v. GREAT NORTHERN RAILWAY COMPANY.[1]

April 14, 1905.

Nos. 14,233—(53).

Appeal from Justice of the Peace.

A notice of appeal from a judgment in justice court stated that the defendant appealed from the judgment, and the whole thereof, and that a new trial of said action was demanded in the district court. Other than this the ground of the appeal was not stated. *Held*, following Smith v. Kistler, 84 Minn. 102, that the notice was void.

Appeal by defendant from a judgment of the district court for Polk county entered pursuant to the order of Watts, J., dismissing an appeal from a judgment of a justice of the peace. Affirmed.

[1] Reported 103 N. W. 11.

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Wm. R. Begg, A. C. Wilkinson, and *Murphy & Duggan,* for appellant.

Bronson & Collins, for respondent.

START, C. J.

The plaintiff recovered judgment against the defendant in justice court, from which it attempted to appeal to the district court of the county of Polk. On motion of the plaintiff, the district court dismissed the appeal on the ground that no proper notice of appeal had been served, and judgment was entered accordingly, from which the defendant appealed to this court.

The notice of appeal was, so far as here material, in these words:

> Take notice that the defendant, Great Northern Railway Company, hereby appeals to the district court in and for the county of Polk and state of Minnesota from the judgment rendered in the above-entitled action and docketed on the 6th day of June, A. D. 1904, in favor of the plaintiff and against the defendant, in the sum of $68.57, and from the whole of said judgment, and a new trial of said action is demanded in the said district court.

The statute relating to appeals from judgments in justice courts (G. S. 1894, § 5068) provides that:

> No appeal shall be allowed in any case unless the following requisites are complied with, within ten days after judgment rendered, viz.: * * * Third. The party appealing shall serve a notice upon the opposite party * * * specifying the ground of the appeal generally as follows: That the appeal is taken upon questions of law alone or upon questions of fact alone, or upon questions of both law and fact.

In the case of Smith v. Kistler, 84 Minn. 102, 86 N. W. 876, it was held—construing this statute—that a notice of appeal from a justice judgment should state specifically the ground upon which the appeal is taken, and that the omission to state in such notice any ground of appeal was fatal to the efficiency of the same.

The only question, then, in the case at bar, is whether the notice

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of appeal states the ground upon which the appeal was taken. The contention of the defendant is that the notice states, in substance, that the appeal is upon questions of fact. The argument in support of this contention, briefly stated, is that the words, "and a new trial of said action is demanded in the said district court," found in the notice, amount to a statement that the defendant desires the questions of fact at issue to be retried; hence the notice states, in substance, that the appeal is upon questions of fact. We cannot so construe the notice. The statute does not require any demand as to the trial in the district court to be stated in the notice, but it does require a statement of the ground of the appeal to be included therein, and provides that the procedure in the district court must be governed by such statement. It would be a forced construction of the language of the notice in question to hold it to be substantially a statement that the appeal was taken upon questions of fact alone. We therefore hold—following Smith v. Kistler, supra—that the notice of appeal was void, and that the appeal was correctly dismissed.

Judgment affirmed.

STATE ex rel. MARCELLUS L. COUNTRYMAN v. WILLIAM LOUIS KELLY.[1]

April 14, 1905.

Nos. 14,287—(13).

Appeal—Bill of Exceptions.

Where, in actions tried before the court without a jury, a "case" or bill of exceptions may, by statute or rule of court, be proposed within a certain time after notice of the filing of the decision of the court, the time within which to propose such "case" or bill of exceptions does not commence to run until service of the notice.

Stipulation of Parties.

But where, after the decision has been filed, the parties take notice thereof, and enter into a stipulation fixing a time for the settlement of

[1] Reported in 103 N. W. 15.

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the case, service of notice of filing the decision is waived, and the parties are governed by the terms of the stipulation. In cases where a stipulation is entered into, the statute or rule of court does not apply.

Alternative writ of mandamus issued from the supreme court upon relation of Marcellus L. Countryman, directed to Hon. William Louis Kelly, one of the judges of the district court for Ramsey county. Writ discharged.

Edward B. Graves, for relator.

William G. White, for respondent.

BROWN, J.

Alternative writ of mandamus requiring the Honorable William L. Kelly, one of the judges of the district court of Ramsey county, to show cause why he should not allow and settle a "case" in an action tried before him.

The facts are as follows: The case of Kampfer v. East Side Syndicate, a corporation, and M. L. Countryman, as receiver thereof, was duly tried before respondent without a jury, and he filed his decision therein on March 2, 1904. Judgment was duly entered pursuant to the findings on May 11, 1904, and defendant appealed therefrom on November 11, 1904. On February 10, 1905, defendant served a proposed "case" upon plaintiff's attorney, which was immediately returned as having been served too late. Application was then made to the trial court for leave to serve the proposed "case," which application was denied; whereupon defendant sued out this writ to compel the trial judge to settle and allow the "case." No notice of filing the decision in the action referred to was ever served upon defendant's attorney, and the right to have the case settled and allowed at this late date is predicated upon rule 47 of the district court rules of practice, which provides that in trials before the court the time for serving a "case" or bill of exceptions shall be computed from the date of service of notice of filing the decision. It is contended that, as no notice of the filing of the decision in the action referred to was ever served upon defendant, the time to settle the "case" had not expired when application was made to the trial judge.

The learned court below denied the application, mainly upon the ground that the rule of court referred to is in conflict with G. S. 1894,

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§ 5400, and therefore inoperative. Whether this view is sound, we need not determine, though we may suggest that, so long as the rule remains unrepealed and in force, attorneys acting upon it in good faith should not be turned out of court on the theory that it is invalid. However, the writ must be discharged on another ground.

It appears from the record before us that at about the time the decision of Judge Kelly was filed the attorneys of the respective parties entered into a stipulation giving defendant thirty days within which to serve a proposed case; that the time was subsequently extended for the further period of thirty days, and no "case" was proposed until nearly nine months after the time so agreed upon had expired. Though a party is not required to take proceedings in an action for the purpose of settling a "case" or bill of exceptions, under the rule of court above referred to, treating it as valid, until notice of filing of the decision is served upon him, it seems clear that he may waive such notice, and does so when he enters into a stipulation agreeing upon a time for that purpose. People v. Circuit Judge, 39 Mich. 123. It is held in this case that by entering into the stipulation defendants waived the notice provided for by the rule of court, and their right to propose a "case," as a strict legal right, expired at the time fixed by the stipulation, about May 2, 1904. The "case" could only be settled thereafter by an application addressed to the discretion of the court. State v. Searle, 81 Minn. 467, 84 N. W. 324. This application was not so addressed, but, on the contrary, was based upon the asserted legal right of defendant to propose and have settled a "case" at the time application was made to the court below.

Writ discharged.

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S. K. SORENSON v. OLE N. TORVESTAD.[1]

April 14, 1905.

Nos. 14,353—(123).

Justice of the Peace—Title to Real Estate.

A justice of the peace has no power to certify a cause to the district court, under G. S. 1894, § 4991, until the title to real estate comes in issue on the evidence. The fact that the pleadings show such issue is not sufficient.

Jurisdiction of District Court.

The improper certification of a cause to the district court under that statute ousts both courts of jurisdiction, and the district court has no authority to remand the same to the justice for trial. The only order the district court can make in such case is one of dismissal.

Appeal by plaintiff from a judgment of the district court for Polk county, entered pursuant to an order of Watts, J., dismissing the action for want of jurisdiction. Affirmed.

L. E. Gossman, and *H. L. Gaylord,* for appellant.

G. F. Cashman, for respondent.

BROWN, J.

This action was brought in justice court to recover the possession of certain crops raised on land to which both parties by their pleadings claimed the right of possession. The complaint alleged that the land on which the grain was raised was owned by one Miller, and plaintiff claimed the right of possession thereof under a lease from him. Defendant denied the ownership of Miller; alleged title to the land in one Schneider, and that he held possession thereof under a lease from him. After issue was thus joined, and before any evidence was taken in support of the allegations of the complaint or the answer, on motion of plaintiff the justice certified the cause to the district court on the ground that the title to real property was involved. The action was dismissed in the district court for want of jurisdiction; the precise point being that the cause was prematurely certified by the

[1] Reported in 103 N. W. 15.

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justice; that the justice had no right, under the statutes, to certify the case until the title of real estate became involved on the evidence. From the judgment of dismissal, plaintiff appealed.

The district court was clearly right in dismissing the case. G. S. 1894, § 4991, under which the justice acted in certifying the cause to the district court, provides that "if it appears on the trial of any action before a justice of the peace from the evidence of either party that the title to real estate is involved, which title is disputed by the other party," the justice shall certify the cause to the district court. This statute is plain and unambiguous, and was construed in Goenen v. Schroeder, 8 Minn. 344 (387), where it was held that a justice has no power to certify a cause to the district court until the title to real estate comes in question on the evidence. This decision is in strict accord and harmony with the statute. And though some doubt was expressed as to its soundness, and an attempt was made to explain it in Merriam v. Baker, 9 Minn. 28 (40), it has been consistently followed in several subsequent cases. Steele v. Bond, 28 Minn. 267, 9 N. W. 772; State v. Cotton, 29 Minn. 187, 12 N. W. 529; Radley v. O'Leary, 36 Minn. 173, 30 N. W. 457. It has become the settled law of the state, and, if a change of the rule is to be made, the legislature should make it. The argument of counsel that, when the pleadings clearly show a controversy as to the title to real estate, the parties should not be put to the expense of summoning witnesses to prove the fact by oral evidence, is met and overcome by the suggestion that a defendant should not have it in his power to oust a justice of jurisdiction by interposing in his answer a fictitious issue of title.

There is no force in the contention of appellant that the affidavit presented to the justice on the motion for an adjournment of the case, disclosing that certain absent evidence tending to show a dispute respecting the title, might properly have been treated as evidence that the title to the land was involved, and justification of the act of the justice in certifying the case to the district court. The affidavit could have no greater effect in this direction than the pleadings. Nor can we adopt the argument that the district court should, instead of dismissing the action, have remanded it to the justice for trial. Our statutes do not sanction a practice of this kind, and the district court prop-

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erly declined to so order. The improper certification of the case to the district court ousted both courts of jurisdiction.

Judgment affirmed.

STATE v. ADER E. FOSTER.[1]

April 14, 1905.

Nos. 14,391—(19).

Village Sewer.

Villages organized under the general law have no power to construct or contract for the construction of sewers until the property owners have an opportunity to perform the work themselves, as provided by chapter 167, p. 215, Laws 1901.

In proceedings in the district court for Blue Earth county to enforce payment of delinquent general and special taxes upon real estate for the year 1902, defendant interposed an answer raising objections to the special tax. The case was tried before Lorin Cray, J., who found in favor of defendant. From a judgment entered pursuant to the findings, plaintiff appealed. Affirmed.

C. J. Laurisch, for appellant.

U. G. Argetsinger, for respondent.

LEWIS, J.

Proceedings to enforce the payment of special assessment upon certain real estate in the village of Mapleton. October 14, 1901, the village council adopted a resolution to construct a public drain on certain streets within the village, which provided that the work should be completed not later than July 1, 1902. Having been duly authorized, the village recorder advertised for bids, and the bid of one Staede for the construction of the entire sewer was accepted by the council; and, pursuant to authority conferred by it, the president of the council and the village recorder entered into a contract with him un-

[1] Reported in 103 N. W. 14.

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der date of November 14, 1901. The subsequent proceedings were carried out, and the assessment against defendant's premises was put in issue by answer in the tax proceedings. The assessment was attacked upon the ground that the resolution and amendments thereto were not legally adopted or recorded; that no notice was ever given the owner of the premises to construct the sewer, and no opportunity was given such property owners to do so before the contract for its construction was entered into on behalf of the village. Objection was also raised to the validity of the proceedings to assess benefits.

Section 2, c. 167, p. 216, Laws 1901, provides that the resolution authorizing the construction of such an improvement shall be served upon the persons named in the resolution (property owners affected) at least forty days prior to the time therein named for the completion thereof. Section 3 provides that, if the work shall not be fully done or constructed in the manner and within the time prescribed in the resolution, then the village council may order the same to be done by the commissioner of public works, or cause the same to be done by contract let to the lowest responsible bidder. Then follows a provision that, within thirty days after the village shall have completed the construction of the work, a hearing shall be had to determine the benefits to property fronting thereon. The village authorities had no power to cause any such improvement to be made, except under the provisions of chapter 167, p. 215, Laws 1901. The resolution authorizing and directing the execution of the improvement must state a time within which it shall be completed. If the property owners do not, within the time prescribed in the resolution, complete the work, then the village council may cause it to be done, either through its commissioner of public works or by contract.

From these provisions it is clear that the legislature reserved to the owners of the property fronting on the improvement the right of constructing or causing to be constructed the improvement, before the village should have any authority to proceed therewith. In this case the village authorities did not wait until after the time fixed for the completion of the work, July 1, 1902, but immediately after adopting the original resolution proceeded to advertise for bids, and let the contract under which the work was subsequently done. The objections made by defendant property owner were fatal to the proceedings. No

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opportunity was ever given defendant and the other property owners to construct the work prior to the time the village entered into the contract, and, at the time such contract was entered into by the village, it was without authority, and the proceedings were void. It is unnecessary to discuss the other objections.

Judgment affirmed.

JACOB SCHMITT v. JOHN SCHMITT.[1]

April 20, 1905.

Nos. 14,202—(2).

Gift.

Evidence tending to show an accepted gift from the father to a son of eighty acres of land considered, and *held* to support the verdict of the jury sustaining the same.

Other errors considered unimportant.

Appeal by plaintiff from an order of the district court for Brown county, Webber, J., denying a motion for judgment notwithstanding the verdict or for a new trial, after a trial and verdict in favor of defendant. Affirmed.

Albert Steinhauser and *Hoidale & Somsen,* for appellant.

Somerville & Olsen, for respondent.

LOVELY, J.

Ejectment to recover eighty acres of land in Brown county. Defendant had a verdict. Plaintiff paid the costs of the first trial, and upon demand obtained a second hearing under the statute, when defendant again succeeded. There was a motion for judgment notwithstanding the verdict or for a new trial upon the grounds that the evidence was insufficient to sustain the verdict and for errors of law occurring at the trial. The blended motion was denied, and this appeal is from that order.

[1] Reported in 103 N. W. 214.

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A careful examination of the entire record indicates that the only question which is it our duty to determine on this review is the sufficiency of the evidence. It appears from the record that one John Schmitt, Sr., who was a resident of Illinois, was the father of two sons, Christ Schmitt and John Schmitt, Jr., the defendant. The father had means, and was desirous of locating these sons in Minnesota. He secured title to a quarter section of land in Brown county, on which there were buildings and improvements. He placed the boys on the land with the probable idea that they were to work it together, pay the taxes, he to receive rental therefor to some extent. There is evidence tending to show that the boys did not get along amicably with each other—that John could not work with Christ—and in the spring of 1891 the latter quit the farm, and went to a place owned by another brother, for whom he worked some months. In the meantime taxes had accumulated. The father learned of this fact, and came to Minnesota, evidently displeased with the management of affairs, and in an interview with the defendant promised that, if he would get married to a certain lady, he would divide the land, give defendant the east eighty, and help him to put up buildings, which he and his wife could occupy as a home. The boy promised to get married as desired by the father, which he did; then went into possession of the land. The father afterwards sent $200 to the father of the wife of defendant, which was used in improvements upon the land. Defendant continued to retain possession, and erected a house thereon, with other betterments of substantial value. As against these claims of defendant it was insisted that the relation between the two brothers and the father was that of landlord and tenant, that it had never changed, that the father was continually demanding pay for rental, which demands and claims were consistent only with such relationship; and we are urged upon the well-settled principle that to establish a parol gift there must be clear and conclusive proof, that the evidence in this case was not of so satisfactory a character as would justify the court in allowing the verdict to stand.

A very careful and thorough examination of the entire evidence leads us to the conclusion that the issues of fact as to the acceptance of the donation by the father to the defendant, which was disputed, and upon which there was a sharp conflict, were proper matters for the

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consideration of the jury. While there is much persuasive force in the arguments urged by appellant in favor of the view that the son did not accept and act upon the gift of the father, but held the eighty upon which he lived under a promise to pay rent, this was clearly denied by the defendant, and his testimony was in some respects supported by other witnesses. While the parol gift of the land was void under the statute of frauds, yet the part performance by the defendant in expending moneys in the construction of the house, his immediate entry and occupation after the promise, within the knowledge of the father, were sufficient to bring the case within the exceptions which have been recognized and established by this court. Brown v. Hoag, 35 Minn. 373, 29 N. W. 135; Slingerland v. Slingerland, 39 Minn. 197, 39 N. W. 146, 46 Minn. 100, 48 N. W. 605. Two juries have sustained the donation of the father. The learned trial court, after carefully considering the entire record, has approved their finding in that respect, and we are unable to say that its action in refusing a new trial should be reversed.

We have considered the other assignments of error, and are satisfied that none of them are well taken, nor of sufficient materiality to require specific notice.

Order affirmed.

J. J. PARSONS v. GEORGE W. WILSON and Others.[1]

April 20, 1905.

Nos. 14,240—(46).

Gaming—Pleading.

The complaint herein alleges that the defendants were running and playing games of poker for money; that the plaintiff played such games with them, and lost and paid to them the sum of $665.50, which they won and took from him in the games so played, and have not repaid the same to him. *Held*, that the complaint states a cause of action against the defendants, and that there is neither a defect of parties defendant to the action, nor an improper joinder of several causes of action.

[1] Reported in 103 N. W. 163.

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Appeal by defendants from an order of the district court for Nobles county, P. E. Brown, J., overruling defendants' demurrer to the complaint. Affirmed.

C. M. Crandall and *George W. Wilson & Son,* for appellants.

J. J. Parsons, pro se.

START, C. J.

The here material allegations of the amended complaint are as follows: That during all the time mentioned in this complaint the defendants, under the name of the Worthington Whist Club, were engaged in running and playing games of chance, called "poker," with cards, for money, in the rooms in the second story of a building located on lot 13 of block 7 in the village of Worthington, Minnesota; that at different times between February 16, 1903, and December 24, 1903, inclusive, as is shown by the bill of particulars filed herein with the clerk of the district court, the plaintiff was induced by the defendants to play and did play with them in games of cards, commonly called "poker," for money, and during the times mentioned herein the plaintiff lost to the defendants and delivered to the defendants, in the games of cards so played with them, the sum of $665.50, over and above all sums won from the defendants by plaintiff in all of the games of cards played with the defendants herein mentioned; and that the defendants won and took from the plaintiff, in the games so played with the plaintiff, the sum of $665.50, over and above all sums of money won by the plaintiff from defendants, no part of which has ever been repaid by defendants to plaintiff. The defendants demurred to the complaint on the grounds that there is a defect of parties defendant, that several causes of action are improperly united, and that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled by the trial court, and the defendants appealed from the order.

The contention of the defendants, briefly stated, is to the effect that the bill of particulars referred to in the complaint is in fact a part thereof, although it is not formally so stated therein; that, reading the complaint and the bill of particulars together, it appears therefrom that the plaintiff has united in his complaint a number of independent causes of action against each of the several defendants;

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and, further, that in a game of poker each party plays for himself alone, and the loser can only hold the party to whom he lost for the amount won from him, and hence the complaint alleges several separate causes of action against each of the several alleged winners set forth in the bill of particulars. If this be the proper construction of the complaint, it may be conceded that the demurrer should have been sustained. It is, however, too obvious for serious argument that the complaint cannot be so construed, even if its allegations be considered in connection with the bill of particulars, which is not necessarily inconsistent with the allegations of the complaint. The complaint clearly and directly alleges that the defendants were running and playing games of poker for money, and that the plaintiff played with them, and lost and paid to them the amount named; which they won and took from him in the games so played. It necessarily follows from these allegations that the complaint states a cause of action, and that there is neither a defect of parties defendant, nor an improper joinder of several causes of action. G. S. 1894, § 6593.

The demurrer was rightly overruled. Order affirmed.

NICHOLAS BURGRAF v. JOHN T. BYRNES.[1]

April 20, 1905.

Nos. 14,320—(135).

Attorney and Client.

An attorney who recovers a judgment may not compromise or discharge the same for a less sum than its value without authority from his client, and if he does so the client may recover the sum received by the attorney, and also maintain his action for such damages as he has sustained by reason of the unlawful settlement.

Appeal by plaintiff from a judgment dismissing the action, entered in the district court for Meeker county pursuant to the order of Powers, J. Reversed and remanded for further proceedings.

[1] Reported in 103 N. W. 215.

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Alva R. Hunt, for appellant.
H. S. McMonagle, for respondent.

LOVELY, J.

This appeal is from a judgment dismissing plaintiff's action upon an order of the trial court holding, in effect, that under the showing made by the pleadings plaintiff was remediless.

It appears from the complaint that plaintiff employed defendant as an attorney at law to prosecute a suit against a third party, one John Lukentsch, for $324.47; that such proceedings were duly had that judgment was obtained for plaintiff on August 13, 1901, for $360.47. On April 2, following, defendant, without authority from plaintiff, settled and compromised the judgment with the judgment debtor for $150, and satisfied the same of record. Plaintiff did not ascertain or know that the judgment had been satisfied until more than two years afterwards. In the meantime Lukentsch had disposed of all his real property upon which the judgment was a lien, and of personal property upon which execution could have been levied, whereby plaintiff was deprived of the means of making it good. The answer admits that defendant, as attorney at law, recovered the judgment set forth, and alleges that proceedings were instituted by plaintiff to recover of defendant $150, for which the judgment was satisfied, and claims that plaintiff had thereby ratified and confirmed defendant's acts. Plaintiff, in reply, sets forth that the alleged ratification arose upon proceedings on a petition which the plaintiff had filed with the district court, asking for an order requiring defendant to turn over the $150 collected by him of the judgment debtor, and for the difference between the amount collected by his attorney and the damages plaintiff had suffered by the alleged unlawful satisfaction of the judgment.

We are unable to give any substantial force to the theory that the summary proceedings by plaintiff to compel his attorney, the defendant, to pay over the money which he had obtained from Lukentsch is to be treated as a final adjustment, or even ratification, of Attorney Byrnes' unlawful acts. Upon the allegations of the complaint, which we are bound to accept upon this review, the unauthorized compromise of the claim of the judgment by the attorney was in excess of the latter's authority, but his client had a right to whatever had been received, and

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might by the summary course adopted under section 6195, G. S. 1894, require his attorney to account to him for that sum upon proceedings in the district court. It is the general doctrine that all profits made in the course of an agency belong to the principal, whether they are in performance of or in violation of the agent's duty to his principal. Smitz v. Leopold, 51 Minn. 455, 53 N. W. 719; Goodhue Farmers' Warehouse Co. v. Davis, 81 Minn. 210, 83 N. W. 531. And this rule would apply between attorney and client as well as to any other relation of trust and confidence, and it does not follow that the efforts of the plaintiff to compel his attorney to account for the moneys received by his unlawful compromise necessarily exhausted his remedy. The client was entitled to what his attorney had obtained, to treat it as his own, and, the judgment having been satisfied within two years from its entry—which was within the statutory right of the attorney (G. S. 1894, § 6184)—to have the damages which he had sustained in being deprived of his lien upon the lands of the judgment debtor or his personal property recovered in an action for that purpose, which was the nature of the claim presented in this suit.

We are very clear that the course pursued by the plaintiff waived no rights to which he was entitled against defendant; neither was there a severance or splitting of the causes of action which made the summary proceedings to compel the payment of the money collected a bar to plaintiff's right to recover.

The judgment is reversed, and the cause remanded for further proceedings.

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ANNA FISCHER and Another v. JOSEPH J. SPERL.[1]

April 28, 1905.

Nos. 14,203—(7).

Will—Undue Influence.

Where a will is sought to be avoided on the ground of undue influence, evidence which reasonably tends to show a mental condition rendering the testator susceptible to such influence should be received.

Setting Aside Gift.

Courts of equity, on grounds of public utility, set aside donations of property made to a donee who stands in a confidential or fiduciary relation to the donor, both where the gift is by deed or contract inter vivos and where it is by will. This rule is applied generally to such relations, and specifically to bequests to a child by a parent.

Burden of Proof.

The mere facts of such relationship and of opportunity to exercise influence do not cast on the child the burden of proving that a will in its favor was not obtained by fraud or undue influence, although, in connection with other sufficient circumstances, that onus may shift from the persons contesting such will to the child proposing it.

Same.

Under the circumstances of this case, *held*, that the burden of proof rested upon contestants.

Question for Jury.

The question of undue influence is one of fact for trial by a jury. Except in clear cases, a court is not justified in directing judgment notwithstanding the verdict of a jury that a will in favor of a child by a parent was obtained by undue influence.

New Trial.

Where the presence of suspicious circumstances is inconsistent with such an entirely clear case, and the trial court is satisfied that the party against whom the verdict is rendered is entitled to some relief, the common-law remedy was to grant a new trial. That remedy has not been changed by chapter 320, p. 729, Laws 1895.

Judgment Notwithstanding Verdict.

Under the circumstances of this case, *held*, that it was error in the trial court to order judgment notwithstanding a verdict that a will was obtained by undue influence.

[1] Reported in 103 N. W. 502.

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Appeal by plaintiffs from an order of the district court for Brown county, Webber, J., granting a motion for judgment in favor of defendant, notwithstanding the verdict. Reversed and remanded, with leave to defendant to apply for new trial.

Hoidale & Somsen, for appellants.

Jos. A. Eckstein and *Somerville & Olsen,* for respondent.

JAGGARD, J.

On July 7, 1903, Anton Sperl died, leaving a properly executed will, made on June 10, 1903, whereby he bequeathed the bulk of his estate to his oldest son, the defendant and proponent. That will was admitted to probate against the objections made by two other children, appellants Anna Sperl (by marriage Anna Fischer) and Otto Sperl. An appeal was taken to the district court, where the issues involved were tried to a jury. The court instructed the jury that the will had been duly and legally executed, and that deceased was of sound and disposing mind when the will was made, but submitted to it the question of undue influence. The jury found on this question in favor of the contestants. A motion for judgment notwithstanding the verdict, made by proponent, was granted. From an order confirming the probate of said will this appeal was taken.

The assignments of error cover a number of rulings on the exclusion of evidence, the charge of the court that the deceased was of sound mind and of sufficient mental capacity to make a will, and the order of the court directing judgment notwithstanding the verdict.

The only error in the rulings upon evidence calling for special attention is the fourteenth assignment, namely:

> The court erred in sustaining respondent's objection to the following offer of proof made by appellants: Offer in writing as follows: "We propose to prove by this witness that deceased said to her that he had been to the depot to take the train, and that while there his mind had become blank, and that when he came to himself he found that the train had gone."

This statement was made to the witness in the month preceding the testator's death. The court proceeded upon the theory that he would allow appellants to show only the sanity or insanity of the testator at

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the time of his death, and all that had any tendency to show undue influence. It is obvious that all competent evidence should be received which reasonably tends to prove the mental condition of the testator at a date sufficiently recent to affect his susceptibility to undue influence. So far as the record reveals, and the general objection of the proponent suggests, this testimony should have been received.

On the merits the record presents the contention of appellants, the contestants, in the alternative, namely: (1) That by reason of the confidential relation between the proponent and deceased, and of other circumstances proven, the burden was cast upon the proponent to show by clear and satisfactory evidence that the execution of the will was not procured by undue influence, and that proponent had not so conclusively proven his case as to justify the court in setting aside the verdict; or (2) that, if such were not the rule as to the burden of proof, then the evidence introduced by the contestants was sufficient to sustain the verdict. On the other hand, the proponent insists that the burden of proof rested on the contestants to show undue influence, and that this, as a matter of law, they had failed to prove.

The first question accordingly to be considered is, what are the circumstances in the record tending to show undue influence? The contestants enumerated sixteen circumstances which they urged sustain their contentions. A brief summary of them is sufficient for present purposes.

The father left the bulk of his estate, some fifteen or twenty thousand dollars, to his oldest son, who seems to have been in better financial condition than the other children, and gave to his other three sons and one daughter only $200 each out of his insurance. Of these children the contestants had both lived with the father until after they were of age, without pay for their hard labor. The testimony revealed considerable family unhappiness, and some disgrace, because of the conduct of one of the sons, who is not a contestant. Abundant opportunity on the part of the proponent to exercise undue influence was shown. Upon the refusal of the son contesting here to go back to the farm, the proponent sold out his business at the solicitation of his father, and, with his family, lived in the same house with his father for five years. The other children were significantly absent from home and from the testator thereafter and when the will was made.

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The proponent gradually became the head of the house. His interest, influence, power of mind, and his actual control over the testator also appear. He manifested a pronounced desire for property, and is a strong and positive man. He gradually assumed dominion over his father's affairs. Repeated and careful examination of his own testimony serves to increase an unfavorable estimate of his craftiness. He was not required by law to be disinterested, or to act in accordance with the normal desire to secure mutual affection between members of the family, but he manifests objectionable subtlety and suspicious acquisitiveness. Under his original agreement with his father, he orally leased the farm for five years, for an equal division of crops. The crops were gathered in common bins, from which, after the first year, seed was taken. Afterwards the farm was run without any division of profits; father and son worked together so as to build up the farm and pay the debts. The money was kept in one common "pile" under lock and key held by proponent. The amount due each was never figured up, nor was any accounting had. When the father wanted money, he asked the son for it. The latter handled all the money. Personal property gradually became the property of the son. Proponent was asked:

> Q. Whatever you bought became yours, and not his? A. Yes. * * * Q. That is, what was his was yours, but what was yours wasn't his? A. Well, that was his too. Generally, when—when he needed money to pay off his debts on the land, because he used more anyhow than I did, but he says, All the machinery and what stock is growing up is yours.

All of the land also went to the proponent by devise. He took notes from his father for money loaned by him to the latter. According to the proponent's own testimony, he put into the transaction some $2,500, but there was testimony that a considerable sum of money of the father's was also used by them jointly.

There was little direct evidence of constraint in the execution of the will. On the one hand, a witness of the contestants testified that the father had said

> That Joe (the proponent) "is after him that he should write everything to his name," * * * and he (the father) says

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"he couldn't do that, because, one—one part, Joe isn't his boy at all, and then still he has got other children besides Joe, and still he might need it himself."

On the other hand, on behalf of proponent, witnesses testified that the father said some years before the will was made, in substance, that the other children had been disobedient, and had left him, and that he should give Joe everything. But a witness for the contestants testified that after this the father had expressed an intention of making an equal distribution.

To show the susceptibility of the testator to influence it was proven that he was at the time of his death sixty or sixty two years of age; that for about a year before his death he had suffered from cancer of the stomach, with respect to which, shortly before his death, he made a trip to a distant city to consult a specialist. There he fainted, and became so weak that he had to be put to bed while visiting a friend. He "looked very bad." He then realized that he could not live. This was a day or two before the will was made. He came back to respondent's house, and the next day went from there to a lawyer's office, where his will was drawn. There was no proof of any other independent advice. He then went to contestants' house and the next morning to the hospital for an operation. A few days after returning from the hospital, he died. Respondent showed that the testator was a man of strong will and stubborn disposition, and that he had transacted some business of his own.

The second question to be considered is what significance has been given to such circumstances by judicial decisions? That legal significance is determined by the salutary rules by which, upon grounds of public utility, courts of equity set aside donations of property made to a donee who stands in a confidential or fiduciary relation to the donor. Huguenin v. Baseley, 14 Ves. 273, 2 White & T. Lead. Cas. Eq. * 556, 6 Eng. Rul. Cas. 834, per Lord Eldon; Ashton v. Thompson, 32 Minn. 25, 18 N. W. 918. Originally that jurisdiction did not apply to wills, because, inter alia, in cases of gifts or contracts inter vivos, there is a transaction in which the person benefited at least takes part, whether he unduly urges his influence or not, and in calling upon him to explain the part he took and the circumstances that

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brought about the gift or obligation the court is plainly requiring of him an explanation within his knowledge. In case of a legacy the legatee may have no part in or even knowledge of the act. Parfitt v. Lawless, L. R. 2 P. & D. 462.

Inasmuch as, however, the force of the reasoning involved is not naturally confined to any particular class of cases, and inasmuch as proof of undue influence on a testator must concern things hidden from ordinary knowledge, and provable in large measure by circumstances only (In re Hess' Will, 48 Minn. 504, 51 N. W. 614; Shepardson v. Potter [Mich.] 18 N. W. 575; Thompson v. Thompson, 49 Neb. 157, 68 N. W. 372; 1 Prob. Rep. An. 111, note p. 119), and inasmuch as both common-law and statutory rules of evidence exclude conversations between the deceased testator and persons interested, necessarily a large part of testimony ordinarily available, the rules have been gradually extended until the subject is commonly treated as if they applied indifferently to wills and to deeds and contracts inter vivos. See Tyrrell v. Painton, L. R. Pro. Div. [1894] 151, 157, and cases hereinafter cited.

These rules govern bequests and gifts between persons in confidential relations generally. Their principle is that of Samuel Romilly's celebrated reply in Huguenin v. Baseley, supra, from the hearing of which Lord Cottenham said in Dent v. Bennett, 4 My. & Cr. 277, "I received so much pleasure that the recollection of it has not diminished by the lapse of more than thirty years," viz.: "The relief stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another." And see Smith v. Kay, 7 H. L. Cas. 779; Coulson v. Allison, 2 De Gex, F. & J. 521; 36 Can. L. J. 690; Fisher v. Bishop, 108 N. Y. 25, 15 N. E. 331.

The circumstances relied upon by the contestants are to be considered in connection with the extreme circumspection (Newhouse v. Godwin, 17 Barb. 236) with which the law regards particularly large bequests by a parent of a number of children to one having the opportunity and manifesting a disposition to unduly influence the testator, and its just rule that it will avoid such discriminations when they appear not to have been clearly "righteous." Porter v. Throop, 47 Mich. 313, 11 N. W. 174; Ashton v. Thompson, 32 Minn. 25, 41, 18 N. W. 918;

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Spargur v. Hall, 62 Iowa, 498, 17 N. W. 743; Davis v. Dean, 66 Wis. 100, 26 N. W. 737. According to the general trend of opinion, the mere facts of relationship and opportunity to exercise influence do not cast on the son the burden of proving that a will in his favor was not obtained by fraud or undue influence. Eastis v. Montgomery, 93 Ala. 293, 9 South. 311, following Bancroft v. Otis, 91 Ala. 279, 8 South. 286; Appeal of Dale, 57 Conn. 127, 17 Atl. 757; McFadin v. Catron, 120 Mo. 252, 25 S. W. 506; Berberet v. Berberet, 131 Mo. 399, 33 S. W. 61. And see Bundy v. McKnight, 48 Ind. 502; Blake v. Rourke, 74 Iowa, 519, 38 N. W. 392; In re Storer's Will, 28 Minn 9, 11, 8 N. W. 827. See note, 1 Prob. Rep. An. 117; note to In re Hess' Will (48 Minn. 504) 31 Am. St. Rep. 665, 670.

But, in connection with sufficient other circumstances, these facts may make out a prima facie case of undue influence, sufficient to cast upon the principal beneficiary the burden of establishing the validity of the will in this respect. Clarity v. Davis, 92 Minn. 60, 99 N. W. 363; Gay v. Gillilan, 92 Mo. 250, 5 S. W. 7; Simpler v. Lord, 28 Ga. 52. And see Disch v. Timm, 101 Wis. 179, and cases cited at page 191, 77 N. W. 196, at page 200. Cf. Cutler v. Cutler, 103 Wis. 258, 79 N. W. 240; note to Richmond's Appeal (59 Conn. 226) 21 Am. St. Rep. 85, 94 et seq.; Samson v. Samson, 67 Iowa, 253, 25 N. W. 233; Dale v. Dale, 38 N. J. Eq. 274. Among the specific circumstances involved in this case upon which the courts have laid stress are the facts that the son was the confidential agent of the father (Miller v. Miller, 187 Pa. St. 572, 41 Atl. 277); the condition of the natural objects of testator's bounty (Beaubien v. Cicotte, 12 Mich. 459); the sickness and bodily infirmity of testator (Myers v. Hauger, 98 Mo. 433, 11 S. W. 974); and the absence of other children (see Smith v. Henline, 4 Prob. Rep. An. 61, and cases cited at page 71, 174 Ill. 184, 51 N. E. 227). After careful examination of the record, and of the exhaustive briefs of counsel, and of many authorities, we are of opinion that the facts and circumstances shown by the record presented to us are not sufficient to shift the burden of proof upon the proponent.

The final question here to be determined, in the light of these circumstances and rules of law, is whether or not the trial court followed the proper practice in directing judgment for proponent notwithstanding the verdict of the jury. We are of the opinion that

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it did not. While some, and perhaps many, American cases, have gone to unjustifiable lengths in depriving parties of their right of trial by jury in these as in other cases, the rule remains that within familiar and conventional restrictions the question of undue influence is for the jury. Prentis v. Bates, 93 Mich. 234, 53 N. W. 153; Baldwin v. Robinson, 93 Mich. 438, 53 N. W. 531; In re Shell's Estate, 28 Colo. 167, 63 Pac. 413. And see cases collected in plaintiffs' brief, and in 49 Cent. Dig. § 769, and see sections 745, 767. In Purdon v. Langford, Ir. R. 11 C. L. 267, 269, 275, 290, Lawson, J., said: "There is no instance in the books, so far as I am aware, and we have not been referred to any, in which the heir at law has been disinherited in a court of law save by a verdict of a jury establishing the will of his ancestor against him. * * * If there be evidence materially bearing upon the issue, the case should be left to the jury. * * * The cardinal maxim of our law, 'Ad questionem facti non respondent judices,' is not to be lightly violated. Every attempt to do so simply introduces confusion and uncertainty." And see Hampson v. Guy, 64 L. T. (N. S.) 778. The court "is not bound by one verdict, but for its better satisfaction may direct a new trial." Boyse v. Rossborough, 6 H. L. Cas. *2.

In Beyer v. Le Fevre, 186 U. S. 114, 22 Sup. Ct. 765, cited by respondent, Justice Brewer, at page 767, 22 Sup. Ct., after referring to the habitual rule of concurrence with the conclusions of the trial and appellate courts in such cases, says of a case in which the suspicious circumstances were "flimsy": "There has always been recognized the right and duty of this court to examine the record, and, if it finds that the conclusions are wholly unwarranted by the testimony, it will set the verdict or report aside and direct a re-examination." The common-law rule, accordingly, in cases of undue influence involving doubt was not to direct a judgment notwithstanding the verdict, but to allow a new trial or re-examination. See 49 Cent. Dig. § 773.

Recourse to that rule is the only one available in this state, unless it was altered by chapter 320, p. 729, Laws 1895. It is the settled interpretation of that act by this court that the legislature did not thereby create a new remedy. Cruikshank v. St. Paul F. & M. Ins. Co., 75 Minn. 266, 77 N. W. 958. The moving party accordingly may have judgment notwithstanding the verdict only in cases where it is

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clear upon the whole record that he is, as a matter of law, entitled to judgment on the merits. Marquardt v. Hubner, 77 Minn. 442, 80 N. W. 617; Kreatz v. St. Cloud School Dist., 79 Minn. 14, 81 N. W. 533. The statute will not bear any other view consistent with the recognition of the constitutional right to trial by jury. Brown, J., in Baxter v. Covenant Mut. Life Assn., 81 Minn. 1, 83 N. W. 459. We are of opinion in this case that the testimony did not so conclusively fail to show undue influence as to justify the trial court in granting judgment notwithstanding the verdict. The order of the lower court is accordingly reversed, and the case remanded, with leave to the proponent and defendant to apply for a new trial.

Order appealed from reversed.

LOUIS J. POPE v. GREAT NORTHERN RAILWAY COMPANY.[1]

April 28, 1905.

Nos. 14,248—(48).

Complaint—Wisconsin Statute.

Complaint in an action wherein an employee of a railroad company seeks to recover for injuries sustained through the alleged negligence of a fellow servant in Wisconsin considered upon a general demurrer, and *held* to state a cause of action under the statutes of that state.

Pleading.

Statements in a complaint that an employee was engaged in doing certain acts in the due and proper performance of his duty, and was without fault, are to be given weight, in construing a pleading, to repel the inference that such servant was guilty of contributory negligence.

Appeal by defendant from an order of the district court for Ramsey county, Kelly, J., overruling a demurrer to the complaint. Affirmed.

W. R. Begg, J. A. Murphy, and *Heber McHugh,* for appellant.

Samuel A. Anderson, for respondent.

[1] Reported in 103 N. W. 331.

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LOVELY, J.

This appeal is from an order overruling a general demurrer to plaintiff's complaint in an action wherein he seeks to recover for injuries claimed to have been sustained through the alleged negligence of a fellow servant in defendant's yard at Superior, Wisconsin. The challenged pleading set forth in detail the history of the accident, but it is only necessary on this review to summarize the essential facts stated therein, with the conditions upon which, as defendant insists, it shows that plaintiff contributed to his own injury.

It appears therefrom that defendant was operating a yard at Superior, adjoining Allouez Bay, where there were docks to which the railway tracks ascended on a rising grade. Plaintiff was a switchman belonging to a crew of five men, composed of an engineer and fireman working on the engine, another switchman, and also a foreman, under whose immediate direction a train of thirteen ore cars were to be pushed by the engine in charge of the engineer upon one of the docks (numbered 2). The engine and cars were equipped with air, whereby, when the same was working in proper condition, the engineer could instantly cause all the brakes on the train to be set and its movements stopped. It is set forth that it was the duty of the foreman on the morning of the day in question, before moving the train to the dock, to test the air by contrivances placed upon each car for that purpose, to ascertain that they were suitable for use. Each one of the freight cars of the train was likewise equipped with hand brakes, which were in good working order. On the occasion in question signals were properly given to move the train upon the dock (No. 2), which were obeyed, and the train pushed up the grade. The foreman and plaintiff discovered, however, while the train was in motion, that one of the switches connected with another dock (No. 3) was improperly set, when plaintiff, in the due and proper performance of his duty, as alleged, stepped from the train, and moved hastily ahead in front of the cars to properly turn and adjust this switch. At this time the train was moving slowly —at the rate of six miles an hour. Plaintiff reached a point two hundred feet ahead of the cars, and then attempted to pass in front to reach the switch he was to operate on that side of the track; but, owing to impediments and pieces of ore on the track, his left foot was caught between the ties, he fell and the remainder of his body was extended

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outside the track as the train continued to slow down to four miles an hour. In the meantime plaintiff, on the ground, signaled to the foreman, who was standing on the ore cars, to stop. The foreman, recognizing the signal as well as plaintiff's peril, transmitted it to the engineer, who applied the air, which worked upon all except the three cars nearest the plaintiff, and these continued to move forward by reason of the momentum already acquired. The plaintiff continued to call to the foreman to stop, but the foreman negligently omitted to set the hand brakes on the three cars which were not controlled by air until they ran upon plaintiff, when they stopped of their own inertia. In addition to the allegation that it was the duty of the foreman to test the air by means of the contrivances referred to, it is specifically stated that he failed and neglected to perform this duty, by reason of which neglect the air brakes on the three cars nearest the plaintiff, which were defective, were not discovered. In consequence of the injuries received, plaintiff's left leg was so badly mangled that its amputation was required.

While the complaint is more full in its specific details, the summary above given is as sufficient a description of the accident as seems to be necessary, and contains no qualification which diminishes the practical effect of the alleged fault of the foreman in failing to test the air previous to the movement of the train, or his alleged neglect to recognize and act upon the plaintiff's call for help, or failure to set the hand brakes upon the cars which ran upon and injured plaintiff; nor does it to any extent admit or concede that plaintiff was wanting in the exercise of ordinary care, but asserts in express terms that he was without fault, and engaged in the due and proper performance of his duty.

A statute of Wisconsin which was in force at the time is properly pleaded, and, so far as applicable and material, is in the following terms:

> Every railroad company operating any railroad which is in whole or in part within this state shall be liable for all damages sustained within the same by any of its employees without contributory negligence on his part. * * *
>
> 2. When such injury is sustained by any officer, agent, servant or employee of such company while engaged in the line of

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his duty as such, and which shall have been caused by the carelessness or negligence of any other officer, agent, servant or employee while in the discharge of or for failure to discharge his duty as such, provided that such injury shall arise from a risk or hazard peculiar to the operation of railroads, no contract, receipt, rule or regulation between any employee and a railroad corporation shall exempt such corporation from the full liability imposed by this section.

The service in which plaintiff was engaged subjected him to railroad hazards, and there can be no doubt, under a reasonable application of the statute quoted, that the defendant was liable for the injuries sustained by plaintiff, unless the contention of defendant is correct—that the facts pleaded disclose such want of care as would transfer the responsibility for the accident from the defendant to plaintiff himself—and we are unable to adopt this conclusion, which has been very strenuously insisted upon by counsel. It is quite easy, in reading the complaint, to imagine or conjecture precautions that might have been adopted by the plaintiff to have avoided the unfortunate result which occurred.

It is suggested that plaintiff should have waited for the cars to stop before passing in front of them; that the obstructions on the track were in plain sight, and could have been avoided by reasonable care. While it would have been safer to have waited for the train to stop, we doubt if it can be said, as a matter of law, that it is an imperative duty of a switchman attending upon the making up of a train to avoid passing in front of it when in motion. It is doubtful if such a servant would be retained in the employ of the company if he were to do so. What the effect of such dilatory action on his part might have been upon the movements of the train or the safety of other employees in this case may have an important bearing upon the conduct of the employee in this respect. Expedition in the business is always required in this occupation, and the duty of the servant is not to be determined by the view of a court ordinarily upon demurrer in an issue of this character. If the movements of switchmen in conjunction with the operation of trains are to be regulated by fixed rules, this will have to be done by the legislature, rather than the courts.

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Whether the obstructions on the track which impeded plaintiff's progress across the same, and caused his prostration thereon, were observable, might depend upon other circumstances than disclosed on the face of the complaint; and the authorities which defendant relies upon we find, upon examination, to be in cases decided upon their merits after trial and production of the facts in evidence. The allegations that the plaintiff was without fault, and that he was in the due performance of his duty, are not to be regarded in such cases as legal conclusions. The conduct of every operator in the railroad yards in the making up of trains depends upon many circumstances and conditions, and little more can be said in characterizing the duty of these servants than that it has been duly performed, and they were without fault; hence such allegations must be treated, from necessity, as statements, to a certain extent, of ultimate facts. Clark v. Chicago, M. & St. P. Ry. Co., 28 Minn. 69, 9 N. W. 75.

It seems very clear that the averment of care and duty on the part of the plaintiff was properly pleaded, and raises an issue of fact sufficient to put the defendant on its defensive showing in this respect.

Order affirmed.

CHARLES A. TURNER v. WILLIAM O. FRYBERGER.[1]

April 28, 1905.

Nos. 14,268—(37).

Executor and Administrator.

Neither the administrator of the estate nor his attorney may, for their personal use and profit by a sale thereof, purchase an outstanding life estate in real estate of which the administrator is trustee. In such case the administrator is chargeable with and must account to the estate for the amount so realized.

In the matter of the estate of Jane Robbins, deceased, plaintiff Charles A. Turner, an heir, filed objections to the allowance of defend-

[1] Reported in 103 N. W. 217.

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ant's final account as administrator. The objections being overruled by the probate court for Hennepin county, an appeal was taken to the district court for that county, where the issues were tried before Willard R. Cray, J., who found in favor of defendant. From an order granting a motion for a new trial, defendant appealed. Affirmed.

Harrison E. Fryberger, for appellant.

Julius E. Miner and *Willoughby M. Babcock,* for respondent.

LEWIS, J.

Appeal was taken to the district court from an order of the probate court of Hennepin county allowing the account of the administrator of the estate of Jane Robbins, deceased.

The facts as found by the trial court are: W. O. Fryberger was appointed administrator with the will annexed, and employed his brother as an attorney for himself, as administrator, and for the estate. Mrs. Robbins left, surviving her, a husband, Nathan J. Robbins, and three children by previous marriages. At the time of her death she was seised and possessed of a house and lot in Minneapolis occupied by her as a homestead, in which her surviving husband succeeded to a life estate. May 20, 1901, the attorney of the administrator purchased from Robbins his life estate for $250, and received a deed therefor. June 1, 1901, the administrator sold the reversionary interest in the property for $700, and on the same day, to the same party, the attorney sold the life estate for $700, and separate deeds were executed conveying such interests to the purchaser. In his final account the administrator accounted for the $700 received from the sale of the reversionary interest. It was also found as a fact that the same attorney had been employed by Robbins to act for him in connection with the estate, for which services he was paid $75. The trial court allowed the administrator $50 for his personal services and $100 for his attorney. The court granted a motion for a new trial, without stating the grounds of the order.

The only question which we deem it necessary to consider on this appeal is whether the attorney occupied such a position with reference to the administrator and the estate that he was prohibited from profiting by the purchase and sale of the life estate. According to the annuity tables, Robbins' expectancy of life was a little over eleven years,

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he being then sixty-four. There were some debts outstanding, and it was provided by the will that the property should be sold and the proceeds disbursed in a certain way. It was apparent that the property would sell more advantageously when the two interests were united than when sold separately, as neither interest would command its real value if offered for sale separately. It therefore became incumbent upon the administrator to use all reasonable means to unite with the owner of the life estate in disposing of the property. Neither the probate court nor the district court found what the value of the life estate was, but the evidence shows that it was agreed between the administrator and the attorney who purchased the life estate that the two interests were of equal value. It also appears that the commission appointed by the probate court determined the value of the life estate to be $700, but it does not appear that the court adopted the decision or fixed any value. There is some evidence tending to show that the attorney and the administrator made attempts to dispose of the property in conjunction with the surviving husband, and it also appears from the testimony of the attorney that he consulted the probate court with respect to the expediency of himself making such purchase, and was advised that it would be proper to do so.

The court is of the opinion that the attorney of the administrator was acting in good faith, believing he had a right to purchase the life estate and dispose of it at a profit to himself, and also acted in good faith in advising the administrator that he was not required to account therefor. It seems that the district court, in cutting down the fees of the administrator and his attorney from the amount allowed by the probate court, took into account the fact that a profit had been made in purchasing and disposing of the life estate. The principles governing a trustee with reference to property embraced within the trust are fully enumerated in King v. Remington, 36 Minn. 15, 29 N. W. 352, and subsequent cases. In respect to the purchase of property belonging to the cestui que trust by the trustee, the rule is that the relation of confidence is in itself sufficient, and no other fact than that relation need be shown. The rule is entirely independent of the fact whether any fraud has intervened, and it is to avoid the necessity of any such inquiry that the rule takes so general a form. Again, the rule stands on the moral obligation to refrain from

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placing one's self in relations which ordinarily excite a conflict between self-interest and integrity. No party can be permitted to purchase an interest in property and hold it for his own benefit where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account and for his individual use. Gilbert v. Hewetson, 79 Minn. 326, 82 N. W. 655; Shadewald v. White, 74 Minn. 208, 77 N. W. 42; Donahue v. Quackenbush, 75 Minn. 43, 77 N. W. 430; and many other cases.

No distinction can be drawn between the administrator as the trustee of the estate, and his attorney. The attorney is simply the representative or the agent, and the administrator the principal. It necessarily follows that, if the administrator were himself prohibited from dealing in the life estate for his own profit, so must his representative and attorney be likewise prohibited. The position is not changed by the fact that the life estate was property not belonging to the estate, but existed as an independent right in the surviving husband, who had the power of disposing of it to whomsoever he would. The point is that there were conflicting interests between the two estates. If the administrator was required to realize the greatest amount which he reasonably could in the execution of his trust, in so doing he necessarily would come in conflict with the owner of the life estate, and his attorney could not represent the life estate owned by himself, and at the same time, as attorney, the reversionary interest under control of the administrator. The position of the attorney in this case is analogous to that of a broker who attempts to act for both parties to a transaction. "The vendor, in the employment of an agent to sell his property, bargains for the disinterested skill, diligence, and zeal of the agent, for his own exclusive benefit." Dartt v. Sonnesyn, 86 Minn. 55, 90 N. W. 115.

Under the facts of this case the parties are brought directly within the rule that the administrator was chargeable with the amount realized, and holds the same in trust for the estate. Perry, Trusts (5th Ed.) 197.

Order affirmed.

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JOSEPH WALSH v. WILLIAM BOYLE.[1]

April 28, 1905.

Nos. 14,270—(47).

Opening Default Judgment.

A judgment upon default should be opened, and defendant permitted, upon reasonable terms, to defend, where he has made application therefor immediately after expiration of time to answer, and where he shows a defense on the merits, a reasonable excuse for a brief delay, and the failure of such relief to prejudice plaintiff.

Discretion of Court.

The exercise of the discretion of the court ought to tend in a reasonable degree to secure determination of rights of parties upon a trial.

Protection of Plaintiff's Interest.

In this case, *held*, that where the answer was served one day after expiration of statutory time to answer, and the application for leave to answer showed a defense on the merits, reasonable excuse, an attachment of sufficient of defendant's land to protect plaintiff, and no delay in trial, the defendant should have been permitted to interpose his defense.

Appeal by defendant from an order of the district court for Lyon county, Webber, J., denying a motion to vacate a judgment in favor of plaintiff entered by default, and for leave to answer. Reversed.

Clague & Enersen and *John Moonan,* for appellant.

Korns & Johnson, for respondent.

JAGGARD, J.

This was an application for leave to serve a proposed answer after the expiration of the statutory time. The summons and complaint were served on July 13, 1904. The time for answering expired on August 2. On August 3, the defendant mailed a copy of his answer, which was received by the attorney of the plaintiff on August 4. On that day a judgment was entered by default. Immediately after return of the answer to the defendant's attorney by plaintiff's attorney, the defendant moved the court for an order opening the judgment and

[1] Reported in 103 N. W. 506.

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permitting him to answer and defend the action on the merits. The ground of this application was that the defendant did not serve his proposed answer within the period provided by law through his mistake, inadvertence, surprise, and excusable neglect. In support thereof he filed his affidavit showing, in substance, that he made a mistake as to the date that the summons and complaint were served upon him; that he was unfamiliar with legal proceedings; that he at all times in good faith intended to defend said action upon the merits. An additional affidavit was filed and signed by the attorney employed by defendant, corroborating the latter as to his mistake in the date of service, and stating that when defendant brought the summons and complaint to his counsel's office defendant stated to him that it was served on July 19. The affidavit of the defendant contained an affidavit of merits. In reply plaintiff contended that it appeared without contradiction that the defendant was well posted in the English language, and readily and intelligently read and wrote the same, and was able to understand the force and effect of the summons and complaint served upon him in this action; that his subsequent conversations with persons making affidavit thereto showed that he did understand the force and effect of the summons. It appeared that the plaintiff had attached lands belonging to the defendant, whereby plaintiff would be fully protected in case he should prevail upon the merits; and that the issues in the case would not have been brought on for trial in the regular order before the December following.

This case comes within the familiar rule that, where an answer discloses a good defense upon the merits, and a reasonable excuse for delay in its service is shown, and no substantial prejudice appears to have arisen from such temporary delay, a court should allow that answer to be introduced. Brown v. Brown, 37 Minn. 128, 33 N. W. 546. The exercise of the discretion of the court ought to tend, in a reasonable degree at least, to bring about a judgment after trial on the merits of the case. Miller v. Carr, 116 Cal. 378, 48 Pac. 324; Watson v. San Francisco, 41 Cal. 17, 20; Reidy v. Scott, 53 Cal. 69. And see also G. S. 1894, § 5267; McMurran v. Bourne, 81 Minn. 515, 84 N. W. 338; Potter v. Holmes, 74 Minn. 508, 77 N. W. 416; Baxter v. Chute, 50 Minn. 164, 52 N. W. 379; Hildebrandt v. Robbecke, 20 Minn. 83 (100). In Braseth v. Bottineau (N. D.) 100 N. W. 1082,

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Young, C. J., aptly said: "An error of one day in stating a date is not such an unusual occurrence that it can be said to be inexcusable." The decision in John T. Noye Mnfg. Co. v. Wheaton Roller Mill Co., 60 Minn. 117, 61 N. W. 910, is to be regarded as the rule of law applicable to the facts in that particular case only, and is not to be extended. It announces no principle inconsistent with the conclusion here reached.

The rule here followed does not "encourage carelessness or unreasonable negligence on the part of litigants." It tends rather to determine the rights of the parties upon a trial on the merits than to deprive of them by mere technicalities. The showing made in this case sufficiently shows a defense upon the merits and an excuse for the delay, very brief in time, resulting in no prejudice. The district court should have granted the motion, and permitted defendant to answer upon reasonable terms. 1 Current Law, § 4, p. 915; 3 Current Law, § 3, p. 1071.

Order appealed from reversed.

HARRY F. STEARNS v. PAUL KENNEDY.[1]

April 28, 1905.

Nos. 14,273—(74).

Vendor and Purchaser.

The vendee in a contract to convey real estate, who has paid a part of the purchase price and entered into possession thereof, is the equitable owner of the land.

Fraud—Remedy of Vendee.

Such a vendee, who has been induced to enter into a contract for the purchase of real estate by the fraudulent representations of the vendor as to the quantity of the land, may, on discovering the fraud, elect to stand by his purchase and sue for the damages he has sustained, although he is not then entitled to a deed of the land, and has not paid the whole of the purchase price.

[1] Reported in 103 N. W. 212.

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False Representations as to Acreage.

False representations of a vendor as to the quantity of a tract of land he offers for sale are not mere matters of opinion, but are material, and he cannot avoid their consequences merely because the vendee might have ascertained their falsity by a survey of the land or by reference to official plats and records.

Action in the district court for Wright county to recover from defendant $1,251 and interest for deceit in the sale of land to plaintiff. The case was tried before Giddings, J., and a jury, which rendered a verdict in favor of plaintiff for the sum demanded. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

W. H. Cutting and *Henry Spindler*, for appellant.

James C. Tarbox, for respondent.

START, C. J.

Action for deceit. The material allegations of the complaint are these: The defendant on and prior to October 10, 1902, was the owner of the northwest quarter of section 7 in township 121, range 26, in the county of Wright, this state, and for the purpose of inducing the plaintiff to purchase it he falsely and knowingly represented to him that the quarter section contained one hundred sixty acres of land. The plaintiff, relying upon such representation, believing it to be true, and induced thereby, did on the day named enter into a written contract with the defendant for the purchase of the land. A copy of the contract is annexed to and made a part of the complaint. The plaintiff has performed the terms of the contract on his part. In and by this contract the defendant covenanted to convey the quarter section to the plaintiff upon his first paying to him therefor $6,800, to be paid $1,400 at the execution of the contract, $300 October 10, 1903, $500 March 1, 1905, and $200 annually thereafter on March 1 until the whole purchase price should be paid, with interest on all deferred payments at the rate of five and one half per cent. per annum. The plaintiff covenanted to so pay the purchase price and the taxes on the land, and was to have possession thereof; but it was further stipulated in the contract that, if the plaintiff failed to keep and perform the terms of the contract on his part, the defendant might, at his option, cancel it,

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and terminate the plaintiff's interest in the land, by giving thirty days' notice of his intention so to do. The complaint further alleges that the representation as to the quantity of the land was untrue, in that the quarter section contained thirty acres less land than the defendant represented; that, if the representation had been true, the quarter section would have been worth $6,800, but in fact it was worth only $5,549, for the reason that it contained no more than one hundred thirty acres of land, to the damage of the plaintiff $1,251.

The answer admitted the making of the contract; denied that the defendant ever made any representation as to the quantity of land; also the allegations of the complaint as to the amount of land in the quarter section; (denied that the plaintiff had performed the terms of the contract on his part, and alleged that on October 10, 1903, there was due on the contract $300 and interest, which the plaintiff refused to pay, and the defendant served notice on him that if he did not pay the amount due in thirty days the defendant would declare the contract forfeited, and re-enter and take possession of the land, but that before the thirty days expired the plaintiff paid the amount due on the contract to October 10, 1903; and, further, that there was due the defendant on the contract a balance $5,100 and interest).

It appears from the record that the plaintiff paid $1,400 on the purchase of the land at the time of the execution of the contract, and the $300 due thereon October 10, 1903, and that at the commencement of this action the other instalments of the purchase price were not due. On the trial the part of the answer which we have inclosed in parenthesis was, on motion of the plaintiff, stricken out as immaterial. The jury returned a verdict for the plaintiff for the amount claimed, and the defendant appealed from an order denying his motion for judgment notwithstanding the verdict or for a new trial.

A solution of the vital questions raised by the defendant's assignments of error depends upon the correctness of two general claims made by the defendant. They are: First. The plaintiff cannot maintain an action at law for the recovery of damages for the alleged fraud until he has received a deed of the land, nor, in any event, so long as the amount of the purchase price remaining unpaid exceeds the amount of the damages claimed. Second. The evidence is conclu-

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sive that the plaintiff had no right to rely upon the alleged representations as to the quantity of the land and in fact he did not.

1. The rules of law applicable to the defendant's first claim are well settled. The vendee in a contract to convey real estate, who has paid a part of the purchase price of the land and entered into possession thereof, as in this case, is the equitable owner of the land, and has an interest therein which he may convey, which is descendible to his heir, and which, if not his homestead, may be subject to the lien of a judgment against him. Randall v. Constans, 33 Minn. 329, 23 N. W. 530; Keith v. Albrecht, 89 Minn. 247, 94 N. W. 677; Hook v. Northwest Thresher Co., 91 Minn. 482, 98 N. W. 463. A party who has been induced to enter into a contract for the purchase of land by the fraudulent representations of the vendor as to the quantity of the land or any other representation materially affecting its value, may, on discovering the fraud, rescind the contract, or elect to stand by his purchase, and sue for the damages he has sustained by the fraud. If he brings an action for damages, he thereby affirms the contract, and must perform it on his part. 2 Warvelle, Vend. §§ 934, 942; Krumm v. Beach, 96 N. Y. 398.

The defendant, however, claims that this rule applies only to cases where the vendee has obtained a deed for the land, or has so far performed the contract that he has the legal right to demand one. The only authority cited in support of this alleged exception to the rule is the case of Daniels v. Newton, 114 Mass. 530. The case cited was one for the breach of a written agreement for the purchase of land from the plaintiff by the defendant, and was brought before the expiration of the time within which the defendant agreed to buy, on the ground that the defendant's absolute declaration of his purpose not to fulfil his contract constituted a present breach thereof. It was held that the action could not be maintained until the expiration of the time within which the defendant had agreed to perform his part of the contract.

The distinction between such an action for damages for a breach of the contract and this action for damages for the deceit of the vendor in inducing the vendee to enter into a contract is obvious. In the case at bar the cause of action accrued as soon as the fraud was discovered. The vendee was entitled to the benefit of his bargain as it

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was represented to be, and upon discovering that it was not he was entitled to maintain this action to recover damages for his loss. If the representations of the quantity of land had been true, then by his contract and the making of the first payment of $1,400 the vendee would have become the equitable owner of a farm containing one hundred sixty acres of land, with the right to secure the legal title thereto upon making payment of the balance of the purchase price in accordance with the contract. But if the representations were untrue, then he acquired by reason of his contract and payment such title and interest in a farm containing only one hundred thirty acres. It follows that he was damaged by the alleged fraud to the amount of the difference between the value of the farm if it had contained one hundred sixty acres and its actual value containing as it did only one hundred thirty acres, for his bargain was worth that much less by reason of the fraud. The plaintiff's right to maintain an action to recover this loss was as complete as it would have been if he had taken a deed for the land and given back a purchase-price mortgage to secure the deferred payments.

But it is claimed by the defendant that in neither case could an action be maintained without first paying the balance of the purchase price of the land. The case of Ranney v. Warren, 17 Hun, 111, is cited in support of the claim. The case is in point, but it seems to be unsupported by either reason or authority, and we cannot follow it. The payment of the balance of the purchase price of the land was not a condition precedent to the plaintiff's right to maintain an action for damages for the alleged fraud. It is true, as defendant suggests, that the plaintiff may never pay the balance of the purchase price, and the defendant may be compelled to take back the land; but this contingency does not affect the plaintiff's cause of action, which became complete when the contract was made, $1,400 on the purchase price paid, and the fraud discovered. Applebee v. Rumery, 28 Ill. 280; Weaver v. Shriver, 79 Md. 530, 30 Atl. 189.

Again, the plaintiff, by his contract, covenanted to pay the balance of the purchase price of the land, and all of it which became due before the commencement of the action was paid, and there is no suggestion in the pleadings or the evidence that he is not solvent; hence equitably, as well as legally, he has a right to prosecute this action. If

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there are facts undisclosed by the record which would equitably entitle the defendant to have the amount of the plaintiff's damages, in case he recovered, applied upon the unpaid purchase price, the burden was upon the defendant to plead and prove them. We hold that the plaintiff was entitled to maintain this action although he had not obtained the legal title to the land, nor paid the whole of the purchase price thereof. It follows from this conclusion that the complaint states a cause of action, that the trial court did not err in refusing to direct a verdict for the defendant, and that the part of the defendant's answer stricken out stated no defense to the action, and was properly stricken out. It was not error for the court to receive the amended answer in evidence. It was verified, and properly received as an admission by the defendant of the facts therein stated. Vogel v. D. M. Osborn & Co., 32 Minn. 167, 20 N. W. 129; Rich v. City of Minneapolis, 40 Minn. 82, 41 N. W. 455.

2. The evidence does not sustain the claim of the defendant that the plaintiff did not rely upon the representations as to the quantity of land in the quarter section. On the contrary, the evidence shows that the plaintiff did rely upon such representations, and had a right to do so. Representations of a vendor as to the quantity of land in a tract which he offers for sale are not mere matters of opinion, but are material, and the vendee may rely upon them, unless, by the exercise of ordinary prudence, he may readily ascertain their falsity. The vendor, however, if his representations be false, cannot avoid their consequences merely because the vendee might have consulted the official records and plats, and had the tract surveyed, and thereby ascertained the quantity of land therein. Porter v. Fletcher, 25 Minn. 493; Olson v. Orton, 28 Minn. 36, 8 N. W. 878; Maxfield v. Schwartz, 45 Minn. 150, 47 N. W. 448; Redding v. Wright, 49 Minn. 322, 51 N. W. 1056.

The evidence relied upon by the defendant as showing that the plaintiff did not rely upon the alleged representations is to the effect that the corners of the quarter section were pointed out to him, and that he went from corner to corner around the land, and knew its boundaries. This did not afford him the means of readily ascertaining how many acres there were in the tract, for, although he knew the corners and boundaries thereof, he could only ascertain the number of acres therein

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by a survey thereof, which he was not bound to make. The evidence is ample to sustain the finding of the jury to the effect that the representations were made that they were false to the knowledge of the defendant, and that the plaintiff had a right to and did rely upon them to his damage in the amount of the verdict.

The instructions of the court to the jury on the question of the plaintiff's reliance are assigned as error. They were not all strictly accurate, but the error was not prejudicial, for the reason the evidence shows, as a matter of law, that the defendant was not guilty of any want of prudence in relying upon the representations.

The defendant's other assignments of error have been considered, and we find no reversible error in the record.

Order affirmed.

FRED HABEGGER v. FIRST NATIONAL BANK OF ST. PAUL.[1]

April 28, 1905.

Nos. 14,284—(76).

Bankruptcy Act—Deposit in Bank.

Money deposited in a bank in the due course of business by an insolvent, within four months of the time he is adjudged a bankrupt, is not a transfer of property amounting to a preference within the meaning of the bankruptcy act of 1898, as construed in New York County Nat. Bank v. Massey, 192 U. S. 138, and the bank may apply the amount of such deposit upon a debt due from the insolvent.

Application on Debt to Bank.

Upon the facts alleged in the answer, which are admitted by the demurrer, it is *held* that the amount to the credit of Strait in defendant bank was properly applied upon a note due from him to the bank.

Appeal by plaintiff from an order of the district court for Ramsey county, Kelly, J., overruling a demurrer to the answer. Affirmed.

[1] Reported in 103 N. W. 216.

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F. J. Leonard and *F. C. Irwin*, for appellant.

E. Southworth and *W. H. Lightner*, for respondent.

BROWN, J.

Appeal from an order overruling plaintiff's demurrer to defendant's answer.

The complaint alleges that on October 31, 1903, and for a long time prior thereto, H. Burton Strait and Henry Schreiner were engaged in the banking business at Jordan, this state; that on the day named the bank was insolvent, and ceased to do business as such; that thereafter, on December 5, 1903, Strait and Schreiner were duly adjudged bankrupts in bankruptcy proceedings commenced in the United States court on November 6, 1903, in which proceedings plaintiff was appointed their trustee; that on said October 31 defendant was indebted to Strait and Schreiner in the sum of $4,559.68, for which sum plaintiff, as their trustee, demanded judgment.

The answer of defendant, after admitting and denying certain allegations in the complaint, not here material, alleged that for more than seven months prior to October 31, 1903, said H. Burton Strait alone and individually was doing business as a private banker at Jordan, this state, and was on said day indebted to defendant in the sum of $8,524.74, being a balance unpaid on a promissory note executed by him and one J. R. Strait, an accommodation maker, on March 25, 1903, payable four months from that date. The answer affirmatively alleged that Strait, as such private banker, became insolvent, and that plaintiff was duly appointed trustee of his estate; that at the time he became insolvent, October 31, 1903, he had on deposit with defendant the sum of $3,059.68; that upon being advised that Strait had become insolvent, and had ceased to do business as a banker, defendant on that day applied the amount so to his credit on its books as payment of his promissory note.

For aught that appears from the pleadings, the money was deposited with defendant in the due course of business, and not with any purpose or intent of preferring defendant as a creditor. Plaintiff demurred to the answer on the ground that it failed to state facts constituting a defense. The demurrer was overruled.

Three contentions are made in this court by appellant: (1) That

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the application by defendant of the amount due Strait as payment of the promissory note held by it against him constituted an unlawful preference within the meaning of the bankruptcy act, it having been made within four months of the date on which Strait was adjudged a bankrupt; (2) that the indebtedness was not a proper set-off, and defendant could not apply it in payment of the promissory note, for the reason that the law of set-off does not authorize the application of an individual claim to the payment of a joint obligation—that, as the credit in the hands of the bank was due Strait, it could not be applied in payment of the note executed by Strait and another; and (3) that defendant waived the right of set-off by not applying it upon the note against Strait when the money was first deposited by him.

1. The first question, namely, whether the application of the credit in the hands of the bank in payment of its note against Strait was an unlawful preference within the meaning of the bankruptcy act, has been disposed of adversely to plaintiff's contention by the Supreme Court of the United States; the decision of which court is final upon all questions involving the construction of that act. New York County Nat. Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. 199. The pith of the decision in that case is found in the syllabus (24 Sup. Ct. 199), which is as follows: "Insolvents, by depositing money in a bank upon an open account, subject to check, do not thereby make a transfer of property amounting to a preference, which, under the bankruptcy act of 1898, c. 541, 30 St. at L. 562 (U. S. Comp. St. 1901, p. 3445) § 60a, will deprive the bank of its right under section 68a to set off the amount of such deposit remaining to the depositor's credit on the date of their adjudication in bankruptcy, and to prove its claim against the bankrupt estate for the balance." This conclusively disposes of this point, and it is unnecessary to extend this opinion by a discussion of the question.

2. In view of the allegations of the answer, which are admitted by the demurrer, the rules of law invoked by plaintiff on the subject of the law of set-off do not apply, and it is unnecessary to consider whether a claim in favor of one person may be set off against the debt due jointly from that person and another. The answer alleges that Strait was alone engaged in the banking business at Jordan, and that the credit for money deposited with defendant was deposited by and

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belonged to him. It further alleges that the promissory note made and delivered to defendant by Strait and another represented the debt of Strait, and that the other person signed and executed the note with him as an accommodation maker. These facts, being admitted by the demurrer, render inapplicable the argument of counsel that an individual debt cannot be set off against a joint debt. We do not, therefore, deem it necessary to enter into a discussion of the law of set-off, and hold, on the facts set forth in the answer, that defendant had the right to apply the credit due to Strait on his promissory note.

3. There is no merit in the third contention—that defendant waived his right of set-off in not applying the money on the promissory note when it was first deposited.

Order affirmed.

JOHN F. KELLY v. PIONEER PRESS COMPANY.[1]

April 28, 1905.

No. 14,292—(106).

Avoidance of Release on Ground of Fraud.

Where a release of damages embracing the subject-matter in a legal controversy is sought to be avoided upon the ground of fraud, it is necessary to show intentional misrepresentations (scienter), and the failure to do so is fatal to the claims of the party relying upon the alleged fraud.

Appeal by plaintiff from an order of the district court for Ramsey county, Jaggard, J., denying a motion for a new trial, after a trial and directed verdict in favor of defendant. Affirmed.

John F. Kelly, pro se.

Frederick G. Ingersoll and *Charles A. Hart,* for respondent.

LOVELY, J.[2]

The parties to this action entered into a contract under the terms of which defendant was to publish for plaintiff copies of the lawbook

[1] Reported in 103 N. W. 330.

[2] Jaggard J., having presided at the trial, did not sit.

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known as "Kelly's Index Digest to the Laws of the State of Minnesota," and, after sales had realized the cost and expenses of publication, was to turn over to the author the electrotype plates it had manufactured for that purpose. Differences arose in the progress of the publication, which led to a suit, instituted by plaintiff against defendant, in which the former sought an accounting for the balance alleged to be due in excess of moneys received on sales of the Digest, and also claimed a delivery to plaintiff, or upon his order, of the electrotype plates used in producing the book, which defendant had agreed to turn over in a perfect condition. Issue was joined in this action, and afterwards a settlement had which is expressed in an agreement, in the form of a receipt executed by plaintiff and delivered to defendant. It was in these words:

> Received of the Pioneer Press Company, the sum of $129.24 in full settlement of the above entitled action instituted by the undersigned against said company, by bill of complaint and summons served March 31, 1903, and of all the matters and things in said bill contained, and said action is hereby dismissed. This receipt and payment is intended in full settlement of all claims existing in favor of the undersigned against the said Pioneer Press Company by reason of that certain contract for the publication of the book known as "Kelly's Digest" and all the matters and things arising therefrom.

Plaintiff accepted the amount named in this receipt, and directed that the electrotype plates be delivered to a third party for his use.

In the present action, which was thereafter brought by plaintiff, after introductory allegations in the complaint, an agreement is alleged whereby defendant was to manufacture and deliver to plaintiff, for the consideration of $227.15, four hundred twelve electrotype plates carefully packed and boxed. It is further set forth that defendant, in violation of its promises previously made, delivered damaged and worthless plates to plaintiff, giving specific descriptive characterizations of the defects, with a claim for damages sustained and interest, with a demand for special damages for the loss of sales of Kelly's Digest, as well as for time and money expended. The defendant answered, denying the making of the contract, alleged the com-

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mencement of the action for an accounting, and an adjustment of matters arising out of the previous connection between the parties. As a distinctive ground of defense in this suit, defendant also set forth that the matters involved in the pending action had been duly settled and dismissed, that a release had been executed and delivered by plaintiff to defendant in evidence thereof, that the money agreed to be paid had been accepted by plaintiff and the electrotype plates turned over. Plaintiff in reply admits the settlement as an alleged accord and satisfaction, but sets forth that the same was procured and obtained by defendant through false and fraudulent concealment of the truth of the facts as to the damaged character of the plates. The cause was tried to the court and a jury. At the close of the testimony a verdict was directed in favor of defendant. There was a motion for a new trial, which was denied. From this order plaintiff appeals.

In construing the terms of the agreement of settlement of the first action, it must be held broad enough to cover and embrace any claim which the plaintiff could make against defendant for its failure to turn over to plaintiff the property of the latter, including the delivery of perfect electrotype plates. Conceding such to have been the obligation of the defendant to the plaintiff, this was within the terms of its contract for the publication of the Digest, and it is not possible to interpret the agreement of settlement, though in terms it is called a "receipt," so as to exclude from its scope and purpose the differences that had arisen between the parties arising from the publication of plaintiff's book. This seems to be practically conceded in plaintiff's reply, under the terms of which no other view can be given to the admissions of plaintiff than that it was executed as a complete accord and satisfaction of the claim in this present action, where it is attempted to avoid the consequence of such agreement by the contention, under facts well pleaded, that it was obtained through deception and fraud. At the trial of the cause the plaintiff wholly failed to show that any deception had been practiced upon him by defendant, that he was misled by any intentional concealment of the truth to his detriment in this regard, or did not understand the conditions upon which such settlement was effected.

It would serve no useful purpose to review the testimony or rulings of the trial court in this respect, since it is very clear that an es-

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sential element to establish the fraud upon which the plaintiff elected to stand, viz., the intentional misrepresentations by which the settlement is alleged to have been secured (scienter), was not made to appear. This determinative issue upon which the plaintiff rested his claim to set aside the settlement having failed, the direction of the verdict in defendant's favor was right, and the order appealed from must be affirmed.

JOHN KANE v. ARNESON MERCANTILE COMPANY.[1]

April 28, 1905.

No. 14,294—(60).

Justice of the Peace.

Action to set aside a judgment upon the ground that the summons was issued by one not a justice of the peace de jure or de facto.

Term of Office.

The city of East Grand Forks was incorporated by chapter 45, p. 602, Sp. Laws 1887, which act established annual elections to be held the first Tuesday in April; provided for the election of two justices of the peace for the term of two years; such officers to qualify by filing the proper oath within ten days from date of notice of election; the notice to be given within three days from the date of the return of the election board. In 1895 the city was reorganized under the provisions of chapter 8, p. 16, Laws 1895. *Held*:

1. The office of justice of the peace provided by the act of 1887 was not abolished by the act of 1895, but such office was recognized and continued, and the qualification of the justices and the commencement of their term of office are regulated by the latter act.

2. The term of office of the justices elected at the general city election in November, 1901, for the ensuing two years, began the first Tuesday after the first Monday in January, 1902, and expired upon the qualification of their successors, who were elected at the general election in 1903.

3. The complaint is defective, in that it does not sufficiently declare that the justice issuing the summons had not been elected at the general election preceding, and had not duly qualified.

[1] Reported in 103 N. W. 218.

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Appeal by defendant from an order of the district court for Polk county, Watts, J., overruling a demurrer to the complaint. Reversed.

Bronson & Collins, for appellant.

F. C. Massee and *G. A. E. Finlayson,* for respondent.

LEWIS, J.

This action was commenced to set aside a judgment recovered against plaintiff by defendant company in the justice court of East Grand Forks, upon the ground that the judgment was void for the reason that the summons in the action was issued by a party not in fact or in law a justice of the peace.

The city of East Grand Forks was originally incorporated by chapter 45, p. 602, Sp. Laws 1887, and under chapter 2 thereof it was provided that the annual election should be held the first Tuesday in April in each year, and that notice of election should be given to each party elected within three days from the return to the city recorder by the inspectors of election, and that each person so elected should, before entering upon the duties of his office, take and subscribe an oath, and file the same with the recorder, within ten days from receipt of notice, or the office would be deemed vacant. The city was reorganized under the provisions of chapter 8, p. 16, Laws 1895. Section 42 of that act provides that the regular city election shall be held on the first Tuesday after the first Monday in November of each odd-numbered year; and section 44, that unless otherwise provided the terms of office of each elective officer shall commence on the first Tuesday after the first Monday in January next succeeding his election.

Section 41 reads in part as follows:

> In all cities wherein there are any justices of the peace, judges of the municipal court, or other city officers, except school officers not provided for by this act, who are elected by the people, such officers shall be elected at the city election held under this act but shall qualify at the time and hold such offices for terms provided by the laws under which such offices exist.

The complaint sets forth that January 28, 1904, the defendant company caused a summons to be issued in a civil action by one Daniel

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Ryan, as justice of the peace, for the recovery of money against plaintiff; that such summons was served on plaintiff, and upon the return day, February 5, 1904, he appeared and caused the action to be transferred from Ryan to George K. Chambers, another justice of the peace; that thereafter such proceedings were taken in the action before Chambers that February 13, 1904, judgment was rendered by default in favor of defendant herein and against plaintiff for $81.35; that at the general November, 1901, election, C. A. Brown and George K. Chambers were duly elected as the two justices of the peace for such election district for the next ensuing term of two years, and that during the time mentioned (January, 1904) they were the duly elected, qualified, and acting justices of the peace, and that their terms did not expire until April, 1904, as provided by chapter 45, p. 602, Sp. Laws 1887; that Daniel Ryan, the person who issued the summons, has usurped, and ever since January 6, 1904, has continued to fill and exercise, the powers and functions of a justice of the peace elected from the district, and issued the summons referred to without any authority; that he had failed to file a certificate of election with the clerk of the district court prior to February 27, 1904, and that his official bond had not been approved by the city council prior to February 25, 1904.

Defendant demurred to the complaint upon the ground that it appears from the face thereof that the court had no jurisdiction of the subject-matter, and that it does not state facts sufficient to constitute a cause of action. The demurrer having been overruled, defendant appealed.

The provision quoted from the last part of section 41, c. 8, p. 29, Laws 1895, was evidently intended to preserve intact the law as to qualification and terms of office, when those matters were regulated by the law which created the office of justice of the peace; and the question is whether the Special Laws of 1887, under which the city of East Grand Forks was originally organized, and which created the office of justice of the peace, contains provisions regulating the qualification and commencement of the term of office, independent of the election therein provided. That act does not establish the date of qualification of a justice of the peace, nor the date of the commencement of his term, except that he must qualify within ten days after re-

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ceiving notice of his election. But the law of 1895, under which the city was reorganized, does away with annual elections, provides for biennial elections, and changes the date of election from April to the first Tuesday after the first Monday in November of each odd-numbered year. After the city reorganized under the General Laws of 1895, there was no April election, no inspectors to make a return thereof, no notice to be given, and consequently no date at which or from which the term of office or qualification of the parties could be fixed. It does not follow that justices were abolished. Their term of office remained as before, two years—the constitutional term—but, the time of qualification having been wiped out by the change in the date of election, qualification of justices and time of commencement of their term of office are regulated by the act of 1895.

Referring now to the allegations of the complaint, it is specifically alleged that in November, 1901, Brown and Chambers were duly elected justices of the peace for the next ensuing term of two years. It follows, as a matter of law, that their term of office began, in accordance with section 44, c. 8, p. 30, Laws 1895, the first Tuesday after the first Monday in January, 1902, and consequently expired upon the election and qualification of their successors elected at the November election, 1903. The general allegation that Brown and Chambers ever since January 1, 1904, have had and still retain possession of the office, and all the documents and papers thereunto belonging, and refuse to deliver possession thereof, and claim to be duly elected, qualified, and acting justices of the peace, is not equivalent to an allegation that such justices were re-elected to succeed themselves in November, 1903. Neither is the allegation that

> Said C. A. Brown still holds possession of the said office, * * * and still is one of the justices elected from the said election district * * * and has not at any time since January 1, 1904, delivered over the possession thereof to any other person,

equivalent to an allegation that he was elected to succeed himself at the November, 1903, election. Although it is alleged that Ryan was a usurper, and has unlawfully exercised the functions of his office since January 6, 1904, yet it is alleged that he had prior to February

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27, 1904, wholly failed to file his certificate of election and official bond. In our judgment, this is not a distinct assertion that Ryan was not elected a justice of the peace at the preceding November election, but is rather an attempt to plead facts which would show that he had not properly qualified as a justice.

If it was the intention of the pleader to set forth facts sufficient to indicate that Ryan had not qualified as a justice of the peace at the time he issued the summons, the pleading is equally defective. In that respect the complaint alleges:

> That the said Daniel Ryan had, prior to February 27, 1904, wholly failed to file his certificate of election, oath of office, and official bond, or certified copy of either or any of the same, with the clerk of the district court in and for said county, and that prior to February 25, 1904, the said official bond of the said Daniel Ryan had not been approved by the city council of the city of East Grand Forks, each and all as required by the statute in such case made and provided.

The only provision with respect to qualification under the act of 1895 is found in section 50, which requires that every person elected shall, before entering upon his office, take and subscribe an oath of office, and file it with the city clerk; and the further provision that the treasurer, clerk, comptroller, and such other officers as the city council shall require, shall severally, before entering upon their duties, execute to the city bonds in such sums and upon such conditions as the council may prescribe. There is no provision requiring the certificate of election, the oath of office, and official bond, or a certified copy thereof, to be filed with the clerk of the district court, and there is no allegation in the complaint that any bond was required of Ryan by the city council. Our conclusion is, therefore, that the complaint fails to state facts sufficient to show that Ryan was not duly elected as justice of the peace at the city election held in November, 1903, and that he had not, at the time of issuing the summons, qualified as such.

This renders it unnecessary to consider whether plaintiff conferred jurisdiction by taking a change of venue to the other justice, and whether this is an action to determine title to an office and the proper remedy.

Order reversed.

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ALBERT S. OLSON v. JOHN BURK.[1]

May 5, 1905.

No. 14,244—(50).

Adverse Possession.

In order that adverse possession of land may ripen into title, there must be continuity of the adverse possession for the full statutory period.

Acknowledgment of Owner's Title.

An acknowledgment by the adverse claimant of the owner's title before the statute has run in his favor breaks the continuity of his adverse possession, and it cannot be tacked to any subsequent adverse possession.

Agreement to Buy from Owner.

The defendant in this, an action of ejectment, was in possession of the land in controversy, and, before the statute had run in his favor, entered into contracts with the owner of the land for the purchase thereof.

Held, that this was an acknowledgment of the owner's title, and broke the continuity of the defendant's alleged adverse possession, and, further, that the findings and decision of the trial court to the effect that the defendant had not acquired title to the land by adverse possession are sustained by the evidence.

Evidence.

The contracts for the purchase of the land were rightly admitted in evidence. There was no reversible error in the rulings of the court as to the admission of evidence.

Appeal by defendant from an order of the district court for Nicollet county, Webber, J., denying a motion for a new trial, after a trial and findings in favor of plaintiff. Affirmed.

Davis & Olsen, for appellant.

A. A. Stone and *A. R. Pfau,* for respondent.

START, C. J.

Action of ejectment to recover possession of government lots 3 and 4, and the southwest quarter of the northeast quarter of section 13, in township 110, range 28, in the county of Nicollet, this state.

The complaint is in the usual form for the recovery of the possession

[1] Reported in 103 N. W. 335.

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of real estate and damages for withholding the same. The answer denied the plaintiff's title, and alleged title to the land to be in the defendant by adverse possession thereof for more than twenty-five years. The cause was tried by the court without a jury, and findings of fact and conclusions of law were made in favor of the plaintiff to the effect that the defendant had not acquired title to the land by adverse possession, but that the plaintiff was the owner thereof and entitled to its possession, and that judgment be so entered, with $135 damages. The defendant appealed from an order denying his motion for a new trial.

The defendant's assignments of error raise the general question, are the findings and decision of the trial court sustained by the evidence? The land in question is a part of the lands granted to the territory of Minnesota by the act of Congress approved March 3, 1857 (11 St. 195, c. 99), to aid in the construction of certain railroads. The plaintiff offered evidence showing that the land was duly certified to the state, and conveyed by it to the Winona & St. Peter Railroad Company, February 26, 1872, and that the railroad company on May 4, 1877, conveyed the land to the Winona & St. Peter Land Company, which conveyed it on February 1, 1901, to the plaintiff herein.

Objections and exceptions to the admission in evidence of the documentary evidence to prove the plaintiff's record title were made on the trial, and the rulings of the court in receiving the evidence are made the basis of several assignments of error. None of them, however, are discussed in the brief of counsel; hence they are waived. Dunnell, Minn. Pr. § 1800.

The evidence offered by the plaintiff established title in fee to the land in the plaintiff. Winona & St. P. Ry. Co. v. Randall, 29 Minn. 283, 13 N. W. 127.

It follows that, if the findings and decision of the trial court to the effect that the defendant has not acquired title to the land by adverse possession are sustained by the evidence, the question now under consideration must be answered in the affirmative.

The evidence tends to show that the defendant entered upon lot 4 in 1867, and lot 3 and the southwest quarter of the northeast quarter of section 13 in 1869, and commenced to improve and use the land, a large part of which was then covered with water, and that from the

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time he so entered upon the land he has continued in the possession and use thereof to the present time. It is not necessary to go into details as to the character and extent of the defendant's possession of the land. It may be conceded, for the purpose of a decision of this appeal only, that, if the continuity of the defendant's alleged adverse possession was not broken by an acknowledgment of the true owner's title, the evidence is such as to require a finding that he acquired title to the land by adverse possession. In order that adverse possession may ripen into title, there must be continuity of the adverse possession for the full statutory period. An acknowledgment by the adverse claimant of the owner's title before the statute has run in his favor breaks the continuity of his adverse possession, and it cannot be tacked to any subsequent adverse possession. The limitation does not again begin to run against the party whose title is thus recognized, and those claiming under him, until the claimant repudiates such title. City of St. Paul v. Chicago, M. & St. P. Ry. Co., 63 Minn. 330, 336, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458; Sage v. Rudnick, 67 Minn. 362, 69 N. W. 1096; Wood, Lim. (3d Ed.) § 270, p. 637; 1 Cyc. 1014.

Acknowledgment of the title of the owner of the land, within the meaning of this rule, may be made in many ways—among others, by the acceptance of a lease or contract for the purchase of the land from the owner thereof. Now, the trial court found that the defendant entered into contracts with the owner of the land in this case whereby he agreed to purchase the land, and the owner agreed to convey it to him upon his payment of the purchase price. If the evidence with reference to the making of these contracts was rightly received, it is ample to establish an acknowledgment and recognition of the title of the owner to the land which would and did interrupt the continuity of the alleged adverse possession of the defendant. Johnson v. Peterson, 90 Minn. 503, 97 N. W. 384.

The first contract, designated in the record as Exhibit B, is dated March 29, 1873. The parties thereto are the then owner of the land, the Winona & St. Peter Railroad Company, party of the first part, and the defendant, the party of the second part. In and by this contract the party of the first part agreed to sell, and the defendant to buy, lot 4—a part of the land here in question—at the price and upon the terms therein stated. The contract contained a provision to

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the effect that, if the defendant failed to make payment of the several instalments of the purchase price, the party of the first part should have the right to declare the contract null and void, and all rights of the defendant should cease. The second contract (Exhibit C) was dated May 16, 1876. The parties thereto were the Winona & St. Peter Land Company, party of the first part, and the defendant, party of the second part. In and by this contract the party of the first part agreed to sell, and the defendant agreed to buy, lot 3 and the southwest quarter of the northeast quarter of the land in controversy upon the terms therein stated, which were similar to those of Exhibit B. The last contract (Exhibit D) was dated May 28, 1890, and was between the same parties as Exhibit C, and similar in its terms. In and by this contract the land company agreed to sell, and the defendant agreed to purchase, all of the land described in the complaint in this action, upon the terms therein stated. Each of the contracts contains a recital of the payment of the first instalment by the defendant of the purchase price of the land, and there was other evidence tending to show that it was paid on one or more of the contracts.

The defendant admitted that he signed all three of the contracts. His claim as to Exhibit B is that before the expiration of the time for making the last payment, and on May 4, 1877, the vendor, the railroad company, conveyed the land therein described to the land company, whereby it divested itself of the title, which absolved the defendant of any further duty to it, and thereby made his possession adverse to the land company from its beginning. The obvious and conclusive answer to this claim is that the continuity of the defendant's adverse possession was broken at the time he entered into a contract with the owner of the land for its purchase, and the limitation of the statute would not again begin to run until he repudiated the title he had thereby acknowledged, and, further, that in no event could he tack his former adverse possession to such limitation. Again, the land company, as the grantee of the railroad company, succeeded to all the rights of its grantor in the land, and took it subject to all its obligations to the defendant, who was then in possession thereof.

It is further claimed that Exhibits B, C, and D were erroneously received in evidence for the reason that it was not shown that the persons purporting to execute them on behalf of the respective cor-

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porations had any authority to do so. The contracts were all signed by the defendant, and whether they were admissible in evidence against him, for the purpose of showing an acknowledgment of the title of the true owner of the land, without proof of such authority, we need not consider, for we are of the opinion that there was sufficient evidence of the execution of the contracts by the corporations to justify their admission in evidence. The contracts purported to be executed by the respective corporations by their land commissioner or his agent. Written authority of the commissioner to execute the contracts for the corporations was offered, but it was rejected by the court. When Exhibits B and C were executed, the authority of an agent to make a contract for the sale of land was not required to be in writing. Brown v. Eaton, 21 Minn. 409; Laws 1887, p. 84, c. 26 (G. S. 1894, § 4215).

The defendant, by Exhibits B and C, acknowledged the title of the owner of the land, and his possession thereof then ceased to be adverse; and the evidence certainly would not require the trial court to find, as a matter of law, that the defendant repudiated such title and held the land adversely for fifteen years before the commencement of this action.

Exhibit D, then, which seems to have been a renewal of Exhibits B and C, was not essential to the defeat of the defendant's claim of title by adverse possession. The evidence, however, is ample that all three of the contracts were in fact executed by the authority of the respective corporations, and were thereafter recognized by them as their contracts.

It is also claimed that Exhibit C was not admissible in evidence because it was absolutely void, for the alleged reason that the vendor land company did not own the land when the contract was made, on May 16, 1876, and no power was conferred upon it by its articles of incorporation to enter into a contract for the sale of land it did not own. It is true, the vendor did not obtain its deed for the land until May 4, 1877, but whether it had previously contracted for the purchase of the land does not appear. The general nature of the business of the vendor, as declared by its articles of incorporation, was the purchasing, acquiring, and holding title to real estate, and bargaining, selling, conveying, and otherwise disposing of the same from time to

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time. The only objection that can be urged against the right of the vendor to execute Exhibit C is the technical one that it could not make a contract to sell the land before it had obtained a deed therefor. This, however, was not forbidden either by the statute nor its articles of incorporation, nor was it contrary to good morals or public policy, and we are of the opinion that the vendor was bound by the contract. Again, long before the time fixed for the payment of the last instalment of the purchase price of the land, when the vendor was to make a deed thereof to the defendant, it had obtained its deed from the railroad company. We therefore hold that Exhibits B, C, and D, were each properly received in evidence.

We find no reversible errors in the other rulings of the trial court in the admission of evidence.

Order affirmed.

GEORGE S. GRIMES v. SPENCER ERICSON and Others.[1]

May 5, 1905.

No. 14,251—(51).

Appeal—Review of Order Sustaining Demurrer.

An order sustaining a demurrer to a pleading entered before hearing of the cause cannot in this court be reviewed upon a denial of a motion for a new trial.

Want of Consideration—Pleading and Proof.

It is not necessary, since it is not generally possible, to allege the distinctive facts showing an absolute want of consideration in a suit on a written instrument, as a check or note. Therefore the allegation that there was no consideration is sufficient to admit proof thereof on that issue.

Failure of Consideration.

But where the consideration has failed, the specific facts showing such failure should be set forth, to authorize the admission of evidence thereof.

Appeal by defendant Spencer Ericson from an order of the district court for Kandiyohi county, Powers, J., denying a motion for a

[1] Reported in 103 N. W. 334.

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new trial, after a trial and directed verdict in favor of plaintiff for $260.86. Affirmed.

T. H. Salmon and *N. L. Ericson,* for appellant.

George S. Grimes, pro se.

LOVELY, J.

This action was brought to recover $250 upon a dishonored check given by defendant Ericson to plaintiff, the payee therein. At the close of the evidence the court directed a verdict in favor of plaintiff for the amount of the check and interest. The action as to the other defendants was dismissed. Ericson moved for a new trial, which was denied. From this order he appeals.

In his separate answer, defendant admitted the execution of the check, but alleged, in terms,

> That there was no consideration whatsoever for the execution of and delivery of said check by defendant to said plaintiff, or, if any, said consideration has wholly failed;

also admitted that the check had been protested in the due course of business, and for a further defense, by way of counterclaim, set forth facts tending to show that plaintiff in a previous action had an agreement with defendant under which the latter allowed suit to be brought in his name against third parties, although he had no interest therein, upon a promise of reimbursement and indemnity; alleging further that he had expended certain sums of money in the conduct of the litigation, and also had incurred costs therein for which he had not been reimbursed by plaintiff; and asked to recover the amount thereof. Plaintiff, in reply to the separate answer of Ericson, alleged that there was a valuable consideration for the check, and denied that it had wholly failed.

The trial court sustained a demurrer to the counterclaim upon the ground that it did not state facts sufficient to constitute a defense or affirmative cause of action in favor of the defendant, which ruling is assigned as error. The order sustaining such demurrer was no part of the procedure during the hearing of the cause, and hence it cannot be reviewed on the appeal from the order denying the new trial. City of Winona v. Minnesota Railway Const. Co., 27 Minn. 415, 423, 6 N. W. 795, 8 N. W. 148.

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At the trial the court sustained an objection to the introduction of any testimony to support the answer, upon the ground that the allegation of the want of consideration for the check was inconsistent with the further allegation that such consideration had failed. While the allegation that the consideration for a written instrument has failed implies that it had once existed, and hence the two defenses are inconsistent, yet we are of the opinion that the statement of want of consideration in general terms, as set forth in the answer in this case, was sufficient to present that issue, since little more can be said in setting forth such ultimate fact than that there was no consideration for an instrument upon which recovery is sought, as the check in suit; but where a consideration originally exists for such an instrument, and has subsequently failed—for instance, by the breach of an agreement to do certain acts, as claimed by defendant here—the specific acts can easily be pleaded, and it is our understanding that this must be done, to admit proof under that issue. 4 Enc. Pl. & Pr. 950.

Our conclusion, therefore, is that the defense that there was no consideration was properly pleaded, but that the allegation that the consideration had failed was not sufficient to admit evidence tending to show that plaintiff had failed to perform certain promises he had made subsequent to the execution and delivery of the check in suit. Hence the order of the court refusing to admit testimony under the answer was erroneous, but, so far as practical results are concerned, we are satisfied that this ruling did the defendant no substantial injustice, for, upon our examination of the entire record, it is clearly apparent that there was a consideration for the check, and that the defendant Ericson relied upon his ability to show that such consideration had failed subsequent to the time of its execution and delivery to plaintiff. This appears very clearly from certain offers of proof, whereby defendant sought to establish at the trial that the consideration for the check was an agreement to procure the release of certain lands from a judgment, and that it was not so procured. This offer was properly refused, because the allegation in the answer of failure of consideration was insufficient to permit such showing. While, technically, the defendant might have shown that there was a total want of consideration for the check at the time it was executed and delivered, it seems conclusive to us that no evidence could have been produced

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which would have established this fact, and that substantial justice has been done under the facts presented upon the real issue in this case; and the order appealed from is affirmed.

Order affirmed.

ATWOOD LUMBER COMPANY v. O. S. WATKINS.[1]

May 5, 1905.

No. 14,272—(43).

Instruction to Jury.

The trial court is not authorized, in charging the jury, to emphasize particular facts disclosed by the evidence, or require the triers to give specific attention thereto, and its refusal in this case to do so *held* not to be error.

Evidence.

Evidence examined, and *held* to reasonably support the verdict returned by the jury.

Motion to Set Second Verdict Aside.

Where a new trial has been granted upon a verdict which is again returned upon the same issues, the trial court may well regard the second finding with more favor than the first, and give greater weight thereto on a motion to set it aside as against the evidence.

Assignments of Error.

Other assignments of error upon the introduction of evidence considered, and *held* immaterial.

Appeal by plaintiff from an order of the district court for Carlton county, Cant, J., denying a motion for a new trial, after a trial and verdict for $588.28 in favor of defendant upon his counterclaim. Affirmed.

F. V. Comfort and *Clapp & Macartney,* for appellant.

J. E. Green and *H. S. Lord,* for respondent.

LOVELY, J.

This action was brought to recover for merchandise furnished and money advanced to defendant by plaintiff; also for the rent of a dwell-

[1] Reported in 103 N. W. 332.

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ing house, the value of the rental of the building being the only part of plaintiff's claim disputed.

Defendant pleaded as a counterclaim that he was a practicing physician, and had agreed to go to Willow River, there to perform professional services for plaintiff in treating medically the employees working in its lumber mill at that place, as well as to render surgical assistance when required, for which he was to be paid one dollar for each man employed in the mill per month, or fraction thereof, while in the service. In reply plaintiff denied the matters set forth in the counterclaim, and alleged that its agreement with defendant was to collect of its employees whom defendant should treat fifty cents per month for each month, if it was able to do so; that this contract was carried out until terminated by plaintiff. The plaintiff further sets up a settlement and payment in full of the balance found to be due.

Upon the issues thus presented a clean-cut controversy over the facts was litigated. There were two trials. On the first defendant recovered a substantial sum. On a motion for a new trial the court set this verdict aside, and ordered a rehearing, whereupon defendant recovered a larger verdict on the second than on the first trial. Plaintiff again moved for a new trial, which was denied. This appeal is from that order.

While it may well be conceded upon the record that the preponderance of evidence would seem to favor plaintiff's contention that it is against the verdict, there being much persuasive force to support its claim in that respect, yet we are not able to say that the conclusions reached by the jury are not supported to some extent by evidence, nor that the affirmations of defendant to maintain his counterclaim are so incredible as to be absolutely unworthy of belief. We apprehend from what appears in the record that the first verdict was set aside because the court, in the exercise of its discretion, thought justice required a resubmission of the cause to another jury. On the hearing of the second motion for a new trial the court gave considerable weight to the view that the questions of fact had been passed upon by two juries, both of which had found in favor of defendant's story against very cogent and potent arguments opposed thereto; and the inference of the court that the finding of the second jury was entitled to considerable weight in its judgment was but natural and proper.

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While not absolutely controlling, the finding of two successive juries under proper instructions as to the law is entitled to consideration to show that there were reasonable grounds for the result reached upon disputed issues of fact. Where the trial court is of the opinion that a verdict is reasonably supported by some evidence, but is against the weight of evidence, it may well be influenced on a motion to set it aside in submitting the case to a second jury when it would not feel warranted in disturbing a subsequent finding rendered on the same evidence. Buenemann v. St. Paul, M. & M. Ry. Co., 32 Minn. 390, 20 N. W. 379.

Certain conceded facts which appeared in evidence during the trial were relied upon by the plaintiff to overcome the statements of defendant that he had been employed under the terms of the contract claimed to have been assented to by defendant, but disputed by plaintiff. These were embodied in an instruction submitted in behalf of the plaintiff wherein the jury were told that they had a right to consider such specific matters and give them weight, thus singling out elements or views upon the controversy which were proper for argument and discussion by counsel, but might very justly be declined to be thus noticed by the court. We see no reason to criticise the conduct of the trial judge in refusing to emphasize these matters. His charge was full and comprehensive on all the issues, and appropriately guarded plaintiff's legal rights.

Whether the contract, as set forth and relied upon by defendant, was within the statute of frauds because not performed within a year, is of very little importance, since under the rule laid down in Spinney v. Hill, 81 Minn. 316, 84 N. W. 116, and followed by Lally v. Crookston Lumber Co., 85 Minn. 257, 88 N. W. 846, upon the finding of the jury, we are required to adopt the view that such contract was executed, and would control the rights of the parties with respect to what had been done, and fixed the value of the services rendered upon it.

We have seriously considered two errors assigned upon introduction of evidence, and are of the opinion that we would not be justified in giving them sufficient weight to order a new trial. They are not important, and need not be specifically mentioned.

While the evidence in support of the verdict is not strong, nor very

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convincing, yet we cannot say that it does not reasonably tend to support the verdict, and in view of the fact that the learned trial court declined to interfere we are of the opinion that the order denying a new trial must be affirmed.

Order affirmed.

MINNEAPOLIS THRESHING MACHINE COMPANY v. DAVID BURTON.[1]

May 5, 1905.

No. 14,298—(71).

Conversion.

Whether an arrangement between the general agent of plaintiff and a third person was independent of the agency contract was a question litigated without objection; and *held*, that the evidence authorizing the consideration of this issue reasonably supports the verdict.

Evidence—Exceptions to Charge to Jury.

Where, upon an issue of fact, the court submits a question properly within evidence received to a jury, such claims as might be predicated upon objections to evidence cannot be raised by exception to the instructions of the trial court upon the ground that the same were immaterial.

Appeal by plaintiff from an order of the district court for Traverse county, Flaherty, J., denying a motion for a new trial. Affirmed.

Lewis E. Jones and *Jones & King*, for appellant.

F. W. Murphy, for respondent.

LOVELY, J.

Action for conversion of a "Victory separator, feeder, and stacker." It was tried to a jury, there was a verdict for defendant, a motion for new trial was denied, and from this order plaintiff appeals.

Defendant was the sales agent of plaintiff, authorized to act in Traverse county. By the terms of the agency contract, plaintiff was entitled to all property for which exchanges were made by defendant; and it is urged on this review that the property in question, by rea-

[1] Reported in 103 N. W. 335.

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son of the provisions of such contract, belonged to the machine company. Conceding that counsel's interpretation of the contract is correct, and that the separator or seeder and stacker had been received by defendant, and hence, under the terms of the contract, would belong to the company, this is not determinative of defendant's rights under the evidence or instructions to the jury at the trial.

The Town of Monson Threshing Company, in Traverse county, desired to purchase an outfit. The general agent of plaintiff (one Dumbolton) effected the sale thereof, which was within defendant's territory, and to some extent the latter seems to have aided in effecting such sale. At all events, under the evidence, the testimony tended to show that the agent Dumbolton recognized the defendant as interested in the sale to the Monson Threshing Company, and agreed with him that he should have the property in suit in lieu of any commissions which he could claim therefor from the plaintiff, and it was delivered under such agreement. The evidence to establish this arrangement between the general agent and the Town of Monson Threshing Company was received without objection. The assignments of error by plaintiff's counsel are based upon instructions of the trial court resting upon evidence that was received in the case, which was of itself reasonably sufficient to sustain the defendant's claim of ownership and right to possession thus litigated, for it does not necessarily follow that the plaintiff could not waive the provisions in the agency contract, and, by an agreement independent thereof, transfer to the defendant the separator, feeder, and stacker for aiding in the sale of its property. Although the agency contract applied in this case it did not necessarily follow from its existence, and it cannot be presumed either that the general agent, Dumbolton, had no authority to waive any provision in the contract, or that, acting for the company, he had no right to make the arrangements relied on.

Upon the litigated questions in this case the trial court instructed the jury substantially that, if they found the contract between the general agent and the Monson Threshing Company was conducted independently of the agency contract between plaintiff and defendant, the latter must be regarded as the owner of the property, and that the transfer to him by the general agent was binding upon the principal. There was evidence to sustain the verdict, and plaintiff is not authorized,

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by exceptions to instructions of the court which solely question their materiality, to consider the same. This should have been first presented upon appropriate objections and limitations on the production of the proofs, which was not done.

Order affirmed.

EMMA HUMPHREYS v. MINNESOTA CLAY COMPANY.[1]

May 5, 1905.

No. 14,374—(45).

Conversion of Capital Stock—Pleading and Proof of Value.

Action for conversion of certain shares of capital stock by the defendant. *Held*:

1. The complaint states a cause of action, although it fails to allege the value of the stock in addition to the damages sustained by plaintiff.

2. The value of an article is ordinarily to be proved by its market value; but, where it has none, what it sold for in a bona fide transaction is relevant to prove its value.

3. The findings of fact by the trial court are sustained by the evidence.

4. The court committed no reversible error in the admission of certain letters in evidence.

Appeal by defendant from a judgment of the district court for Anoka county, entered pursuant to the findings and order of Giddings, J. Affirmed.

O'Brien & Albrecht, for appellant.

Keith, Evans, Thompson & Fairchild, for respondent.

START, C. J.

Action for the conversion by the defendant of twenty nine shares of its capital stock of which the plaintiff was the alleged owner. The cause was tried by the court without a jury, and findings of fact made in favor of the plaintiff to the effect that the defendant converted the stock, whereby the plaintiff sustained damages in the sum of

[1] Reported in 103 N. W. 338.

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$1,901.36, the value of the stock, for which amount judgment was directed for the plaintiff. It was so entered, and the defendant appealed from the judgment.

1. The first contention of the defendant is that the complaint does not state a cause of action. It alleges, in effect, that the plaintiff subscribed for seventy five shares of the capital stock of the defendant corporation, of the par value of $100 for each share, and that for value received such shares were issued and delivered to her by the corporation, and that she was the owner thereof; that thereafter the defendant, without any right or authority, and without her knowledge or consent, passed a resolution by its board of directors declaring a cancellation of the stock and the certificates thereof; that thereafter, and on September 29, 1903, the plaintiff, without any knowledge of such action by the defendant, entered into a contract with a Mr. Baker, for the purchase from him of a certain tract of land, who agreed to receive in full payment thereof twenty nine of her shares of the capital stock of the defendant at a valuation of $2,000 and a conveyance from her of certain land owned by her; that, if such contract for the purchase of the land of Baker had been executed, she would have received for her twenty nine shares of stock a consideration of the actual value of $2,000; that the defendant notified Baker that the stock was illegally issued to the plaintiff, and had been cancelled by it, and refused, although duly requested, to transfer the stock on its books to the proposed purchaser thereof, who thereupon and by reason of the defendant's wrongful acts refused to carry out his contract with the plaintiff; and, further, that by such wrongful acts of the defendant the plaintiff had been damaged in the sum of $2,000.

It is urged that the complaint fails to state a cause of action, because there is no direct allegation of the value of the stock or of the respective tracts of land. The objection is without merit, for in an action of conversion of personal property it is not necessary to allege in the complaint the value of the property converted, if it contains an allegation of damages. In such a case the value of the property is evidence of the damages sustained and need not be pleaded. Brunswick-Collender Co. v. Brackett, 37 Minn. 58, 33 N. W. 214.

The complaint contains a proper allegation of general damages. It also alleges facts tending to show special damages in the loss of

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a sale of her stock by the alleged wrongful acts of the defendant. On the trial evidence was given by the plaintiff tending to establish such special damages. The defendant objected to such evidence as incompetent, irrelevant, and immaterial; but there was no objection that the evidence was not admissible under the pleadings, hence the sufficiency of the allegations of the complaint as to such special damages cannot be raised for the first time on appeal. We hold that the complaint states facts sufficient to constitute a cause of action.

2. The next group of assignments of error to be considered raises the question of the sufficiency of the evidence to sustain the findings of the trial court. It is claimed by the defendant that the finding that the stock in question was issued to the plaintiff for a valuable consideration is not justified by the evidence, but, on the contrary, the evidence clearly shows that no consideration whatever was paid for the stock, and that it was mere bonus stock, which the defendant had a right to cancel. The evidence relevant to the question of the consideration for the stock is not entirely satisfactory, but we are of the opinion that it is sufficient to sustain the finding.

The trial court also found that the stock in question was of the value of $1,901.36, and that the plaintiff had sustained damages to that amount by the wrongful acts of the defendant. The defendant urges that this finding is unsupported by the evidence. It appears from the evidence that the stock had no market value; hence evidence of what it sold for in a bona fide transaction was relevant to prove its value. Harrow v. St. Paul & Duluth R. Co., 43 Minn. 71, 44 N. W. 881. The evidence tends to show that the plaintiff made a bona fide contract for the transfer of the stock, whereby she would have realized for the stock a sum equal to its value, as found by the trial court, if the execution of the contract had not been prevented by the acts of the defendant. The evidence was sufficient to support the findings as to the value of the stock and the amount of plaintiff's damages.

It is further claimed that there was no evidence to support the finding that the defendant converted the stock. The record does not sustain the claim, for it discloses evidence tending to support the allegations of the complaint as to the cancellation of the stock by defendant and its refusal to transfer it. Any act of dominion wrongfully

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exercised over another's personal property in denial of his right constitutes a conversion of it. Cumbey v. Ueland, 72 Minn. 453, 75 N. W. 727. The refusal of the defendant to transfer the stock on its books and its assertion of the right to cancel the stock was a conversion of it. Nicollet Nat. Bank v. City Bank, 38 Minn. 85, 35 N. W. 577; Allen v. American B. & L. Assn., 49 Minn. 544, 52 N. W. 144.

3. The last group of alleged errors relates to the admission in evidence of certain letters between the plaintiff, by her agent, and a Mr. Nelson, who, as claimed by the plaintiff, was the party through whom the plaintiff and Baker communicated with each other with reference to the contract between them. A part of this correspondence was received in evidence without objection, but a large portion of it was received over the defendant's objection that it was incompetent and immaterial. The reason here urged why the letters were not properly received in evidence is that no authority was shown from Baker to Nelson to receive and answer letters on his behalf. Conceding that the objections in the district court were sufficient, and that it was error to receive the letters, yet it was not reversible error, for the competent evidence in the case is sufficient to sustain the court's findings of fact. Mankato Mills Co. v. Willard, supra, page 160.

Judgment affirmed.

WILLIAM H. MASON v. EDWARD THOMPSON COMPANY.[1]

May 12, 1905.

Nos. 14,234—(34).

Rescission of Contract.

A party to a contract in default in the performance on his part of the terms and provisions thereof has no right, as a matter of law, while so in default, to rescind the contract for the failure or refusal of the other party to perform.

Attorney and Client.

The general rules and principles of the law of principal and agent apply to the relation of attorney and client, where the employment of the at-

[1] Reported in 103 N. W. 507.

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torney is for the purpose of collecting claims due the client. In such case the attorney has no implied authority to extend the time of payment of claims in his hands for collection.

Foreign Corporation—Action on Foreign Contract.

Chapter 69, p. 68, Laws 1899, prescribing conditions on which foreign corporations may do business in this state, does not prohibit such corporations from maintaining actions in the courts of this state founded upon contracts made in other states.

Findings—Evidence.

The findings of the trial court *held* not sustained by the evidence, in the respects stated in the opinion, and the judgment appealed from is reversed.

Action in the municipal court of St. Paul to recover $463 for breach of contract. Defendant interposed a counterclaim for $63 upon promissory notes given by plaintiff pursuant to the contract. The opinion states the facts. The action was tried before Hine, J., who found in favor of plaintiff for $181 and interest. From a judgment entered pursuant to the findings, defendant appealed. Reversed and new trial granted.

J. F. Hilscher, for appellant.

E. R. Wakefield and *W. H. Mason,* for respondent.

BROWN, J.

The facts in this case are as follows: Defendant is a corporation, created and doing business in the state of New York, and engaged in publishing the American & English Encyclopædia of Law and the Encyclopædia of Pleading & Practice. On June 14, 1899, plaintiff, who then resided in the state of Kansas, entered into a contract with defendant for the purchase of the above-named works. At the time the contract was entered into, quite a number of the volumes of each work had been published and were ready for delivery, and were thereafter, under and pursuant to the contract, delivered to the plaintiff at his residence in Kansas, in payment for which plaintiff made and delivered to defendant certain promissory notes of five dollars each, payable monthly thereafter. For the subsequent volumes he agreed to pay defendant the stipulated price upon delivery. Several volumes were thereafter issued and delivered to plaintiff, and he paid for them, but

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is in default in the payment of the promissory notes given for the volumes delivered at the time the contract was made.

Plaintiff subsequently removed from Kansas to St. Paul, this state, leaving the books so purchased from defendant with a third person at his place of residence in Kansas. The promissory notes were subsequently sent to defendant's attorney at St. Paul for collection, and plaintiff made a few payments thereon. The last two volumes of the Encyclopædia of Law and the last three volumes of the Encyclopædia of Pleading & Practice were never delivered to the plaintiff, and for the failure of defendant to deliver them plaintiff, on April 17, 1901, gave notice to defendant that he rescinded the contract, and demanded that defendant refund to him the total amount he had paid on his contract for the books, viz., $181, notifying defendant at the same time that the books already delivered were at his residence in Kansas, subject to its order. Defendant refused to refund the money on this demand, and plaintiff brought this action in the municipal court of St. Paul to recover the same. The court below found the facts in plaintiff's favor, and ordered judgment for the amount claimed, with interest, from which defendant appealed.

1. We are of opinion that the judgment appealed from must be reversed. It is undoubtedly true that the failure or refusal of one party to perform an executory contract constitutes legal justification for the other to rescind the entire contract and demand to be restored to his former position. But the law is well settled that the right to rescind on the ground of failure of performance belongs to the party who is himself without fault. Even though he has sufficient grounds for rescission, if he has done some act which justifies the other party in refusing or delaying performance, or has failed to perform his own part of the contract, the right to rescind does not exist. 24 Am. & Eng. Enc. (2d Ed.) 647; Graf v. Cunningham, 109 N. Y. 369, 16 N. E. 551; Wright v. Reusens, 133 N. Y. 298, 31 N. E. 215; Myers v. Gross, 59 Ill. 436; Hatton v. Johnson, 83 Pa. St. 219. There is no controversy in the evidence in the case at bar upon the question whether plaintiff was in default of his payments at the time he attempted to rescind the contract. Several promissory notes given by him for the books at the time the contract was entered into were then overdue and unpaid. These notes were not given in discharge of the contract of purchase,

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but were a part thereof. They were but evidence of the debt created by the contract, and a failure to pay them was a breach of its terms. The contract will justify no other construction. It expressly provides that, in case of a failure of plaintiff to meet any one of the notes at maturity, all remaining unpaid notes shall immediately become due and payable, and that the company may retake all books previously delivered, title to which is, by the terms of the contract, reserved in the company until the purchase price thereof is fully paid. So the notes and the stipulation for their payment are constituent parts of the whole contract, and should be construed together.

2. Plaintiff seeks to avoid the principle of law just stated on the theory that just prior to the date on which he attempted to rescind the contract the time of payment of the overdue notes was, by an agreement with defendant, extended, and that on the date of the letter announcing his rescission he was not in default in any of the payments previously due. The trial court found in favor of this contention, but our examination of the evidence leads to the conclusion that the finding is not sustained. The agreement relied upon is founded upon a conversation with the attorney of defendant who had the notes for collection. There was no evidence that the attorney was clothed with any general power to act for defendant, and it was not shown that he had authority to grant an extension of the time of payment. It is thoroughly settled that the general rules and principles of the law of principal and agent apply to the relation of attorney and client where the attorney is acting in the capacity of collector, though his powers and authority are materially extended when employed to manage and conduct litigation. When employed to collect a debt, he has no authority in excess of that of an ordinary agent. 4 Cyc. 932, and cases cited. He has no implied power to grant additional time to his client's debtor. Lockhart v. Wyatt, 10 Ala. 231; Nolan v. Jackson, 16 Ill. 272; Osborn v. Storms, 65 Ind. 321; Beatty v. Hamilton, 127 Pa. St. 71, 17 Atl. 755. There being in the case at bar no evidence of authority in the attorney to extend the time of payment, the trial court erred in finding that an extension had been granted.

But, in any event, the evidence is far from showing an agreement on the part of the attorney to extend the time of payment, conceding that he had authority to grant it, and conceding further that there was

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a sufficient consideration to sustain it. The only agreement shown appears to have been the result of a conversation with the attorney of defendant in which plaintiff stated to the attorney that he was short of money at the time, but would pay occasionally as he received his wages; to which the attorney replied, "That will be all right." This was not, as a matter of fact, an extension of time; and was evidently not so understood by either party, for, notwithstanding the conversation, the attorney continued to press plaintiff for the payment of his overdue notes. The test in determining whether a valid extension of the time of payment was made is whether, if an action had been brought to recover upon one of the notes, the extension could have been pleaded as a defense. The conversation relied upon in this case was clearly insufficient for that purpose. It was, at most, a mere indulgence, and insufficient to relieve plaintiff from his default.

3. And again, it is clear that plaintiff failed to show any right of rescission, independent of the fact that he was not in a position to rescind. His right to rescind was based upon an alleged refusal of defendant to perform the contract on its part in failing to deliver the subsequently issued volumes of the work. This would, if true, give rise to a right of rescission. But there is no evidence in the record of a refusal on the part of defendant to carry out the contract. No demand for performance was made by plaintiff, and the record discloses no refusal on its part to deliver the subsequently issued volumes. The demand made upon the attorney who had the notes for collection was wholly ineffectual for any purpose. The contract for the delivery of the books was made in Kansas, where plaintiff resided, and they were to be delivered to him at that place. He had removed from his home in that state to St. Paul, and this, coupled with his default in the payment of the notes given for the books, clearly justified defendant in delaying further deliveries to him; and its failure to deliver them did not, under the circumstances shown, give plaintiff the right to rescind. Robson v. Bohn, 27 Minn. 334, 7 N. W. 357; Kokomo v. Inman, 134 N. Y. 92, 31 N. E. 248.

4. In view of a possible new trial, it not being a case in which it is proper to order final judgment, we deem it advisable to consider one other question presented in the record. Defendant pleaded as a counterclaim in this action the unpaid notes given by plaintiff for the books.

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At the trial plaintiff moved for judgment on the pleadings, so far as the counterclaim was concerned, on the ground that defendant was a foreign corporation, and had not shown a compliance with chapter 69, p. 68, Laws 1899, prescribing conditions on which foreign corporations may do business in this state. The court granted the motion, and in this we think it erred. In the first place, defendant, respecting the transaction involved in this case, was not doing business in this state within the meaning of the statute. The contract made the basis of plaintiff's action, and also of the counterclaim, was entered into in the state of Kansas, and defendant was not required, as a condition precedent to the right to bring suit in this state to enforce it, to comply with the terms of the statute referred to. That statute was not intended to prohibit foreign corporations not doing business in this state from maintaining actions or interposing defenses in the courts of this state founded on contracts made in another jurisdiction. It refers and was intended to apply solely to foreign corporations doing business within our borders, and not to corporations doing business elsewhere and seeking to enforce their contracts in our courts. The right of such corporations to sue in this state is granted as a matter of comity between states, which the legislature did not intend to abrogate by this statute. In the second place, the courts should have presumed that defendant had fully complied with the provisions of the statute on this subject, if compliance therewith was necessary, as held in Lehigh Valley Coal Co. v. Gilmore, 93 Minn. 432, 101 N. W. 796.

Judgment reversed and new trial granted.

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DAVID TOZER v. OCEAN ACCIDENT & GUARANTEE CORPORATION, LIMITED.[1]

May 12, 1905.

Nos. 14,241—(56).

Insurance—Employer's Liability.

An indemnity insurance contract provided that appellant would compensate respondent on account of bodily injuries accidentally suffered by his employees, not to exceed $5,000 in any one case; that respondent should give immediate notice of all claims growing out of an accident, not interfere with negotiations for settlement by appellant, render appellant assistance in the conduct of litigation, procure witnesses, and furnish bonds upon appeal—appellant agreeing, at its own cost, to defend, in the name of respondent, all proceedings, and have the absolute right to determine the right of appeal. An action having been commenced against respondent for damages occurring to a boy claimed to have been employed by him contrary to law, respondent gave notice to appellant of the pendency of the action, and of all of the known facts in connection therewith, and surrendered the defense into its hands. Appellant thereupon took charge of the case, conducted the litigation, which resulted in a judgment against respondent, and prosecuted an appeal in the appellate court, which resulted in an affirmance of the judgment. Thereupon respondent made demand upon appellant for the amount of the indemnity, which was refused.

1. *Held*, appellant, having been informed of all the facts, and voluntarily assumed control of and conducted the litigation, was estopped from denying its liability under the contract of indemnity, notwithstanding the contract provided that there should be no liability on the part of appellant in case of injuries to any child employed by respondent contrary to law.

2. *Held*, the complaint states a cause of action.

Action in the district court for Washington county to recover $5,219.07 upon an employer's liability insurance policy. From an order Williston, J., overruling a general demurrer to the complaint, defendant appealed. Affirmed.

[1] Reported in 103 N. W. 509.

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Morton Barrows, for appellant.

A provision in a policy of personal accident insurance exempting the company from liability while the insured is engaged in violating the law, is available in defense only where it appears that the unlawful character of the act exerted a direct causative influence on the injury. Conboy v. Railway, 17 Ind. App. 62. In the case cited, and similar cases, the contract expressly covered the person or subject-matter, but avoided the liability while he was violating the law. In the case at bar, Perry never at any time came within the terms of the contract, for he was at all times illegally employed.

The doctrine of practical construction has no application to this case. The meaning of the exclusionary clause is not doubtful or ambiguous, but is as clear as words can make it. When there is no ambiguity, and when the words are capable of but one construction, the subsequent conduct of the parties, showing their construction of the language, will not be considered by the court in determining the meaning of the language used. 1 Greenleaf, Ev. (12th Ed.) § 274; Northern Assur. Co. v. Grand View Bldg. Assn., 183 U. S. 308, 318; Hill v. Duluth City, 57 Minn. 231; Western v. Missouri, 91 Ill. App. 28; Methodist v. Ashtabula, 20 Ohio C. C. 578; Howell v. Johnson, 38 Ore. 571.

Defendant has not by its acts made itself liable to plaintiff on the theory of estoppel. An estoppel does not in itself give a cause of action. It prevents a person from denying a certain state of facts. Seton v. La Fone, 19 Q. B. Div. 70. The law of estoppel rests on the major premise: That a duty exists to observe an appropriate measure of prudence to avoid causing harm to others. The common-law duty to exercise care to avoid doing harm to others may be derived from the ownership, custody, control or use of instrumentalities which may of necessity, or in reasonable probability, inflict damage. 2 Jaggard, Torts, 865; Stephen, Dig. Law Ev. (2d Ed.) 184; Ewart, Est. 12, 19, 28, 68; Jorden v. Money, 5 H. L. Cas. 185. An estoppel in pais arises when one by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence, induces another to believe certain facts to exist, and such other rightfully acts on the belief so induced, in such manner that if the former be permitted to deny the existence of such facts it will prejudice the latter. Pence

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v. Arbuckle, 22 Minn. 417, 420; Norman v. Eckern, 60 Minn. 531; Fitzpatrick v. Hanson, 55 Minn. 195; Plummer v. Mold, 22 Minn. 15; Western Land Assn. v. Banks, 80 Minn. 317, 320; 11 Am. & Eng. Enc. (2d Ed.) 421; Bigelow, Est. 473; 1 Story, Eq. Jur. § 199.

In the law of estoppel, nothing is better settled than this: That a party is not estopped by a statement of a conclusion of law upon undisputed facts. Thus, where a representation was made by a person under misapprehension in law of her title, which misapprehension was common to all parties, the doctrine of estoppel in pais did not apply. Estis v. Jackson, 111 N. C. 145; Holcomb v. Boynton, 151 Ill. 294; Plummer v. Mold, supra. No one is to be estopped from asserting a fact, unless there has been some prior misrepresentation of that fact, upon the faith of which some person has changed his position. Ewart, Est. 12.

J. N. Searles, for respondent.

LEWIS, J.

Demurrer to a complaint upon the ground that it does not state facts sufficient to constitute a cause of action.

Appellant company entered into a contract of insurance with respondent whereby it agreed to compensate respondent for any loss from the common-law or statutory liability for damages on account of bodily injuries accidentally suffered by his employees. The contract, which is made a part of the complaint, among other things provided that the corporation would pay the assured, subject to certain conditions: (a) The full amount of such sum for which a settlement might be effected by the corporation's representative; (b) eighty per cent. of such sum for which the assured shall, in his discretion, effect a compromise with the injured person, when, in the judgment of the assured, he is legally liable for the injury, subject to certain conditions unnecessary to set out; (c) eighty per cent. of all medical, surgical, and all other expenses for which the assured should render himself liable; (d) the full amount of such sum as the assured shall pay upon a judgment recovered against him after final determination of the litigation; the total liability being limited to $5,000. The contract further provides that the assured shall, upon the occurrence of an accident, give immediate notice thereof, with all the information obtainable, to defendant,

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and of all claims on account of any accident that may be rendered against the corporation, and give all co-operation and assistance in his power, and that the assured shall not interfere with any negotiations for settlement which the corporation may be conducting, or in any legal proceedings, without the corporation's consent. The assured shall also, when requested, aid in securing information, evidence, and attendance of witnesses, and in effecting settlements, conducting the litigation, and furnishing bonds or undertakings on appeal. The assured is also required, if an action is brought against him for damages on account of an injury covered by the policy, to immediately forward to the head office of the company every summons as soon as served upon him; and defendant company agrees, at its own cost, to defend against all such proceedings in the name and on behalf of the assured, and shall have the absolute right to determine whether the appeal shall be taken from any judgment or order.

The policy contained the following clause: "This policy does not cover any loss from liability for injuries to, or caused wholly or in part by, any child employed by the assured contrary to law."

The complaint then states that, while the contract was in force, respondent employed a minor fourteen years old, James Elmer Perry, who during such employment was injured by having his foot caught in the machinery, which resulted in an amputation of the leg; that he had been employed contrary to the provisions of chapter 171, p. 386, Laws 1895, which require respondent to procure and keep on file a certificate from the school superintendent and school board permitting such employment.

It is alleged that immediately after respondent gave notice of the accident to appellant, with all the information obtainable, as required by the contract, appellant inquired into and ascertained the facts and circumstances of the employment and the accident, and the nature and character of the claim, and thereupon advised respondent that he was not liable therefor, and informed him that it would take up and conduct negotiations in the matter of the claim with Perry's attorney, and give it such further attention as it might require, and requested respondent to furnish appellant with an itemized statement of the time and wages of the boy and his father, as the same appeared upon the payroll, all of which was duly furnished by respondent. It is then al-

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leged that the boy, through his guardian, brought action against respondent in the district court to recover damages for his injuries, on the ground of negligence on the part of plaintiff in failing to furnish him with a safe place in which to work and with suitable appliances, and in neglecting to warn him of the danger of working around the machinery, and, further, that the employment was contrary to law.

The complaint further states that the summons and complaint in the action were duly served upon respondent, who thereupon gave notice thereof to appellant, as required by the contract, and immediately forwarded to its head office the summons and complaint, and surrendered full control of the defense to appellant, all in accordance with the terms of the policy; that defendant accepted the control and defense of the action in the full belief on the part of both respondent and appellant that the claim so made against respondent was a loss within the terms of the policy; that, with full knowledge of the nature and character of the claim, appellant assumed the defense of the action, and employed an attorney, who conducted the defense in the name of plaintiff, as provided by the contract; that the cause came on for trial, and resulted in a verdict for the boy of $7,750. One of the issues presented by the pleadings and submitted at the trial was whether the boy had been employed by respondent contrary to law, and the trial court instructed the jury that such employment was illegal.

Appellant moved for a new trial of that action, which being denied, appeal was taken to this court, for which purpose respondent executed a certain indemnity security bond for the benefit of appellant upon such appeal. The action was duly prosecuted upon appeal, and the order of the trial court was affirmed denying the motion for a new trial, and judgment was thereupon entered in the district court for $8,269.12, of which amount appellant's attorney agreed to pay $5,000, provided respondent should pay the judgment in full; that thereafter the judgment was paid by respondent, and fully satisfied, and demand was made upon appellant company for $5,000, with interest, which is refused upon the ground that no liability attached under the provisions of the contract on account of such accident.

The complaint also alleges that, prior to the commencement of the action for damages, Perry, through his attorney, informed appellant, through one of its adjusters, who had in charge the adjustment of the

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claim, that he would settle and discharge respondent from all liability for $5,000; that appellant refused the offer, and never advised respondent that it had been made; and it is averred that, had appellant informed respondent of the fact that it denied liability to respondent under the terms of the policy, then, had it been necessary, respondent would have taken control of the matter and settled the case for $5,000.

The trial court sustained the complaint, and respondent justifies the decision upon the following grounds: First, that the clause with reference to employment of children contrary to law should be construed as though it read, "This policy does not cover any loss from liability for injuries to any child employed by the assured contrary to law, which is the proximate result of his employment contrary to law;" second, that the clause referred to is ambiguous, and the parties to the policy adopted a practical construction thereof to the effect that the employment was not necessarily illegal, and consequently that appellant was liable under the policy; third, that appellant, by its conduct, waived the right to claim the policy did not extend to the loss sustained by respondent in the suit brought by Perry, and that appellant is estopped by its conduct from denying its liability under the policy.

These propositions are vigorously assailed by appellant, and we consider the first and second positions of respondent untenable. We are not inclined to the view that the condition proposed by respondent should be read into the clause in question. The clear intent of the language is that, where a child was employed by the assured contrary to law, there should be no liability on the part of appellant, and whether such child should be employed contrary to law did not depend upon whether or not the injuries sustained were the proximate result of such illegal employment. We do not regard the language of the clause in the policy referred to as ambiguous, and hence the subsequent conduct of the parties is not to be accounted for upon the theory of practical construction.

But the third position taken by respondent is sound. The complaint sufficiently sets forth facts which create an estoppel in pais. In other words, appellant, by its conduct with reference to the litigation, is estopped from denying its liability under the terms of the policy. It is alleged that both parties assumed appellant was liable in indemnity; but the question of estoppel is not necessarily determined by the fact

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that they were mistaken as to the law. The position of respondent, as the insured party, did not prevent him from taking the most favorable view of the facts likely to be developed at the trial; and if, for purposes of its own, appellant chose to proceed as though liable upon the contract, it cannot change positions simply because it was mistaken as to the effect of the law. At the trial of the damage case the position was taken by appellant that under the statute the employment was not illegal, for the reason that the work engaged in by the boy was not of a dangerous character; and the further defense was made that there was no liability, because the boy was guilty of contributory negligence. At that time appellant was furnished all the information with reference to the accident, and, as required by the terms of the policy, three courses of action were open to it: It might have taken the position that there was no right of indemnity, even if respondent was liable; it might have taken charge of the litigation, and conducted it to a termination, for the benefit of respondent, provided he were given to understand that appellant did not consider itself bound by such conduct and liable under the terms of the policy; or appellant might have considered that there was a possible liability of indemnity, and preferred to take charge of the litigation, rather than turn it over to respondent. According to the statements of the complaint, appellant took the last course—assumed charge of the defense, submitted to the court in that action its theory of the law and facts, and attempted to sustain the position that there was no liability. Relying upon such course of conduct, respondent changed his attitude in respect to the case, and, instead of reserving to himself the right to select his own counsel, conduct a trial, or make settlement, he turned over to appellant the entire matter, and executed the surety bond at its request.

While it may be that the acts of appellant were not such as to constitute a waiver, strictly speaking, yet there was at least an election of positions; and, having pursued a course of action consistent with its liability, such conduct ripened into an equitable estoppel. No doubt appellant acted in good faith; but bad faith is not always necessary to estoppel, and it does not always follow that no estoppel will arise when the party to whom the representation is made has knowledge as to the truth of all the facts. Appellant comes within the rule that a person is precluded from taking, merely because his interests may change,

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a position inconsistent with the one previously assumed by him, and to the prejudice of a third person. 1 Am. & Eng. Enc. subd. 6, p. 46.

We think the position of appellant in this case is analogous to that of a party who has taken advantage of an unconstitutional law to stay execution against him by putting up a bond. In such case it has been held that he would not be permitted to question its validity thereafter, notwithstanding that the law under which he was proceeding was afterwards declared unconstitutional. Davis v. Wakelee, 156 U. S. 680, 15 Sup. Ct. 555. In that case the following general statement was made: "It may be laid down as a general proposition that where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." So, in this case, simply because it may be for its interest, appellant will not be permitted to change its position to the prejudice of the party who acquiesced in its line of conduct. By its own election appellant put the question of indemnity at rest.

Order affirmed.

BROWN, J. (dissenting).

The court in the opinion correctly states the elements essential to give rise to an estoppel, but, as it seems to me, wholly fails to recognize the elementary rule that no person can invoke the doctrine, unless to deny him the right to do so would result in his substantial injury or damage. The doctrine of estoppel is purely equitable, and is resorted to and applied by courts of justice for the purpose of awarding redress and preventing injury, and for no other purpose. Unless injury or damage result from a reliance upon the acts or conduct of another, no estoppel arises.

In the case at bar, while the elements of an estoppel, in so far as the acts and conduct of defendant are concerned, exist, the complaint fails to show that plaintiff has been injured or damaged by a reliance thereon, except to the extent the recovery against him exceeded the settlement he could have made, had the offer for that purpose been communicated to him. It clearly appears that plaintiff was liable in the action which defendant undertook to and did defend for him under the mistaken im-

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pression that the cause of action there involved came within its contract of insurance or indemnity, but that liability was not caused or in any manner created by the acts of defendant in conducting the defense. It arose solely from the negligence of plaintiff, and his wrongful act in employing the injured boy in violation of the statute, and recovery was had against him upon that ground. It should not be assumed, for the purpose of aiding plaintiff at this time, that, had he conducted the defense of the action with his own counsel, the facts creating his liability would or could have been concealed, or by other means a recovery against him prevented. It follows, therefore, that plaintiff has not been injured by the acts of defendant, and cannot invoke the doctrine of estoppel, except as already conceded—to the extent the recovery against him exceeded the offer of settlement, which he alleges he would have made, had it been communicated to him.

HYMAN FEGELSON v. NIAGARA FIRE INSURANCE COMPANY and Others.[1]

May 12, 1905.

Nos. 14,256—(69).

Insurance—Joining Several Causes of Action.

Each of six defendants issued to the plaintiff its policy insuring him against loss by fire of his goods. Each policy was of the Minnesota standard form, and contained a provision to the effect that the liability of the insurer should be limited to the proportion of the loss which the amount of its policy bore to the total amount of valid insurance on his property. He sustained a partial loss, and each defendant denied any liability on its policy, and he brought this action against all of them for the purpose of having the liability of each determined. The defendants severally demurred to the complaint on the ground that several causes of action were improperly united. *Held*, that the demurrer was correctly overruled.

[1] Reported in 103 N. W. 495.

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Appeal by defendants, Niagara Fire Insurance Company, Lafayette Fire Insurance Company, Traders' Insurance Company and New York Fire Insurance Company from an order of the district court for Ramsey county, Bunn, J., overruling their demurrer to the complaint. Affirmed.

M. H. Boutelle and *N. H. Chase,* for appellants.

O'Brien & Albrecht, for respondent.

START, C. J.

The plaintiff brought this action against six fire insurance companies to recover on six separate policies of insurance covering his stock of merchandise, furniture, and fixtures, each company issuing one policy. The complaint alleges, in effect, that each of the defendants is a foreign corporation doing a fire insurance business in this state; that at the time of the issuing of each of the polices and until the loss thereunder the plaintiff was engaged in business in the city of St. Paul, and owned a stock of merchandise and store furniture and fixtures; that before February 24, 1904, each of the defendants issued to the plaintiff its policy of insurance, whereby it insured the plaintiff against loss or damage by fire of his merchandise, furniture, and fixtures for the time and to the amount stated in its policy; each of the policies was of the Minnesota standard form required by section 53, c. 175, p. 417, Laws 1895, and by its terms allowed concurrent insurance without limit; that while all of the policies were in force, and on February 24, 1904, the property insured by the policies was in part destroyed and injured by fire, the total loss and damage being the sum of $6,366.25; that the plaintiff made due proof of his loss under each policy, but each of the defendants refused to pay any part of the loss, and claims that it is not liable upon its policy therefor; and, further, that the amount of the liability of each defendant for such loss depends upon the liability of the other defendants, and that to adjust the respective liabilities of the defendants it is necessary at the same time to determine the liability of each, and for this reason, and to prevent a multiplicity of suits, it is necessary to join all of the defendants in this action. The prayer of the complaint is that the court will ascertain the facts and the amount of the plaintiff's loss, and the proportionate share thereof of each defendant, and award judgment accordingly.

Two of the defendants answered the complaint, but the other four

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severally demurred to it on the grounds that it does not state facts sufficient to constitute a cause of action, and that several causes of action are improperly united. The defendants appealed from an order of the court overruling their demurrer. It is here conceded by them that the case of Kelly v. Liverpool & L. & G. Ins. Co., supra, page 141, is decisive against them of the question raised by their first ground of demurrer. The complaint states facts constituting a cause of action.

The sole question, then, for our decision is whether several causes of action are improperly united in the complaint. Each of the policies contained the following provision, namely:

> If there shall be any other insurance on the property insured, whether prior or subsequent, the insured shall recover on this policy no greater premium of loss except in case of total loss on buildings sustained than the sum hereby insured bears to the whole amount insured thereon.

It may be conceded that this pro rata liability provision does not make the liability of the respective companies a joint one, and that the liability of each is several, to be determined by the terms of its own contract. Bardwell v. Conway, 118 Mass. 465; Hanover v. Brown, 77 Md. 64, 25 Atl. 989, 27 Atl. 314. This, however, is not determinative of the question whether several causes of action are improperly united in the complaint, for separate causes of action may be so united in exceptional cases. Does this pro rata provision, which is common to all of the policies, bring this case within any well-recognized exception to the general rule that several causes of action to enforce the separate liability of several defendants cannot be joined in the same complaint? We are of the opinion that the question must be answered in the affirmative. The pro rata provision limits the liability of each insurer to the proportion of the loss which the amount of insurance named in its policy bears to the aggregated amount of insurance named in all of the enforceable policies on the property. We say "enforceable policies" advisedly, for the provision under consideration specifically makes "the whole amount insured" one of the essential factors in determining the liability of each insurer on its policy. This necessarily implies valid or enforceable insurance, not simply insurance in form, whether valid or not. It follows that the several policies set out in the

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complaint are not wholly independent of each other, for they are so far correlated that by the express stipulation of each the extent of the liability assumed in each is to be measured by the total amount insured by all of them.

It is necessary, then, in order to determine the amount which the plaintiff is entitled to recover against each of the defendants herein, to determine conclusively as against each two questions in which there is a community of interest among all of the defendants, namely, the amount of the plaintiff's loss and the amount of his valid insurance upon the property lost or damaged by fire. When these essential and precedent questions are determined, the ascertainment of the amount of the liability of each defendant is simply a matter of mathematics, for the liability or nonliability of each defendant on its policy is necessarily conclusively determined when the total amount of the valid insurance is established. A verdict or decision on the question as to the amount of the loss and the total amount of the insurance necessarily affects and binds all parties to the action, and they have a community of interest therein. Now, if the plaintiff cannot bring all of the defendants into one action, and have these questions determined as a basis for accurately and conclusively ascertaining the pro rata liability of each insurer for his loss, he is without any certain, speedy, adequate, and convenient remedy in the premises, and he is remitted to the uncertain remedy of a multiplicity of suits. If a separate action against each defendant be his only remedy, he must bring six actions, instead of one, in each of which the same evidence on the two essential questions must be gone over, and the law applicable thereto determined, with the not improbable result that the amount of his loss and the amount of his valid insurance will be fixed at a different amount in each case. Such a remedy is neither certain nor adequate, depending as it does upon the aggregate result of a multiplicity of vexatious actions.

It is clear upon principle and authority that equity has undoubted jurisdiction to prevent the necessity for such a multiplicity of actions and to afford the plaintiff a certain and adequate remedy. "Courts of the highest standing and ability have repeatedly interfered and exercised this jurisdiction, where the individual claims were not only legally separate, but were separate in time, and each arose from an entirely separate and distinct transaction, simply because there was a commun-

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ity of interest among all the claimants in the question at issue and in the remedy." 1 Pomeroy, Eq. Jur. § 269; City of Albert Lea v. Nielsen, 83 Minn. 246, 251, 86 N. W. 83; Pretzfelder v. Insurance Co., 116 N. C. 491, 21 S. E. 302; Virginia-Carolina v. Ins. Co., 113 Fed. 1, 51 C. C. A. 21; Tisdale v. Three Insurance Companies, 84 Miss. 709, 36 South. 568.

It is true that the issue tendered by the answers of the several defendants may not be identical, but such contingency does not affect the equitable jurisdiction of the court to bring all of the defendants into one action for the determination of the essential questions in which all of them have a community of interest, and thereby prevent a multiplicity of suits. Having jurisdiction, the court will grant full relief. The court has ample power to protect the interests of all the parties. It is difficult to suggest any good reason why the procedure adopted by the plaintiff in this case should not be sustained. We hold that several causes of action are not improperly united in the complaint, and that the order overruling the demurrer was correct.

Order affirmed.

MARY SCHAEFER v. LUCY SCHOENBORN.[1]

May 12, 1905.

Nos. 14,263—(54).

Unauthorized Stipulation of Attorney.

Where, in dismissing an action by stipulation, the attorney does not assume to act by virtue of the general authority implied by his employment, but proceeds upon the mistaken assumption that express authority had been conferred upon him, his client is not necessarily bound thereby, but may within a reasonable time repudiate the stipulation and have the cause reinstated. A motion to that effect is directed to the sound discretion of the court.

Appeal by plaintiff from an order of the district court for Wilkin county, Flaherty, J., denying a motion to vacate a stipulation for a

[1] Reported 103 N. W. 501.

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dismissal of the action previously entered into by the attorneys of record of the respective parties. Reversed.

R. J. Wells and *Purcell, Bradley & Divet,* for appellant.

Lewis E. Jones and *Jones & King,* for respondent.

LEWIS, J.

Action for slander, in which Robert J. Wells, of Breckenridge, Minnesota, appeared as attorney of record for plaintiff, and Messrs. Purcell, Bradley & Divet, of Wahpeton, North Dakota, as counsel. After issue had been joined, August 9, 1904, a stipulation was entered into between the attorney of record and defendant's attorney dismissing the action upon the merits. Immediately upon learning of the stipulation for dismissal, and within ten days thereafter, plaintiff made application to the district court for an order vacating and setting it aside. The motion was heard September 14, and plaintiff appeals from an order denying the motion.

From the notice of motion, and from the affidavits read upon the hearing, it conclusively appears that the stipulation was entered into by the attorney of record without plaintiff's knowledge; that her principal counsel were Messrs. Purcell, Bradley & Divet. From plaintiff's affidavit it appears that August 8 and 9, 1904, she was absent from Breckenridge, her place of residence, and had been away for about three weeks; that on or about August 21 she returned, and learned of the fact that her case had been settled by dismissal, whereupon she called on Mr. Purcell, and was informed by him that the attorney of record, Mr. Wells, had reported to the firm that the settlement was satisfactory to plaintiff; that she at once disclaimed the settlement, and denied she had ever authorized or instructed such settlement to be made on her behalf; that she never received any part of the $100 paid Mr. Wells in consideration of the settlement. Affidavits of Mr. Wells were read at the hearing, from which it appears that he was acting as attorney of record in the action, and received his appointment to appear for plaintiff through the firm of Purcell, Bradley & Divet; that he entered into the stipulation for settlement in consideration of the payment of $100 as attorney's fees for plaintiff's attorneys, and at the time of making the stipulation he had never received any authority from plaintiff personally so to do; that August 9 defendant's attorney

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came to his office, at Breckenridge, and offered $100 in settlement of the case. Mr. Wells stated to the attorney that it was not his case; that he would submit the proposition to Mr. Purcell, and ascertain what he had to say about it, whereupon he called up Mr. Purcell's firm by phone, and, finding Mr. Purcell away, talked with Mr. Divet, stating to him the proposed settlement, and told Mr. Divet that at the time plaintiff signed the complaint she asked to have the clause relative to money damages stricken out, as she did not want the money, and only desired to stop the talk about her; that Mr. Wells understood Mr. Divet to say that the terms would be satisfactory, and thereupon he entered into the stipulation; and that in the conversation Mr. Divet said that it was his understanding that plaintiff did not want any money, but only that her character might be vindicated, and, so far as their firm was concerned, a settlement that way would be perfectly satisfactory. Mr. Divet, in his affidavit, stated that, in the conversation over the telephone with Mr. Wells, he did not intend to authorize any judgment, settlement, or dismissal of the action, but was acting solely upon the understanding and belief that the proposed adjustment or settlement was plaintiff's wish, and did not do more or otherwise than to acquiesce in a settlement which, he understood from the conversation, had already been agreed upon by plaintiff. A counter affidavit on the part of defendant was read at the hearing, to the effect that she paid Mr. Wells $100 in full settlement, and at the same time delivered to him a statement to the effect that she retracted any and all derogatory statements theretofore made by her, if any, of or concerning plaintiff; that she acknowledged her error in uttering such statements, if she did so, and declared plaintiff to be a woman of good character and above reproach. It was stated in plaintiff's affidavit that upon a former occasion defendant had made similar retraction, but that she had ignored the same, and had reiterated the slanderous charges set forth in the complaint.

From the papers presented to the trial court, it appears that Mr. Wells was not assuming to act by virtue of the authority conferred upon him as the attorney of record for the plaintiff, and we need not, therefore, consider what were his powers in effecting a settlement under such general authority; but it conclusively appears that Mr. Wells assumed, from the previous conversation with plaintiff in re-

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spect to demand for compensation in money, that she would be entirely satisfied, and would authorize a settlement, provided her character, which had been maligned, was vindicated, and that he had assumed to enter into the stipulation with the understanding that such an arrangement would be satisfactory to plaintiff, and the object of calling upon the other attorneys for plaintiff, and discussing the matter with them, was to inform them of the nature of the stipulation entered into. The conclusion seems unavoidable that Mr. Wells was mistaken in assuming that he had express authority to effect such settlement, and it is unquestioned that such consent as Mr. Divet may have given on behalf of himself and his firm was upon a misapprehension of the facts. Such consent was evidently given upon the theory that Mr. Wells had received express authority from plaintiff to make settlement in the manner in which he did.

The affidavits read on behalf of defendant, which were directed to the merits of the case, in opposition to the motion, were entirely irrelevant, and should not have been taken into consideration. The question before the court was not upon the merits of the case, nor was it a question of the sufficiency of the pleadings. The motion papers and supporting affidavits presented simply one question—whether the stipulation should be set aside for the reason that it had been entered into under a misapprehension of the facts and was without authority. We think it conclusively appears that it was, and that the order should have been granted.

Order reversed.

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CLARENCE M. RAWITZER v. ST. PAUL CITY RAILWAY COMPANY.[1]

May 12, 1905.

Nos. 14,265—(81).

New Trial.

Action to recover damages for the death of the plaintiff's intestate, caused by the wilful negligence of the defendant. Verdict for the plaintiff for one dollar. *Held*, that the defendant was not entitled to a directed verdict, and that the trial court rightly granted a new trial for inadequacy of the damages.

Action in the district court for Ramsey county by plaintiff as administrator of the estate of Harry Jacobs, deceased, to recover $5,000 for the death of decedent. The case was tried before Olin B. Lewis, J., and a jury, which rendered a verdict in favor of plaintiff for one dollar. From an order granting a new trial, defendant appealed. Affirmed.

Munn & Thygeson, for appellant.

Welch, Hayne & Hubachek and *Jones & Jones,* for respondent.

START, C. J.[2]

The plaintiff's intestate, a young man, seventeen years of age, was, on October 1, 1903, killed by being struck by one of the defendant's cars. This action was brought to recover the damages sustained by the next of kin on the ground that his death was caused by the alleged wanton and wilful negligence of the defendant. On the first trial of the action the court directed a verdict for the defendant, and upon an appeal to this court from an order denying the plaintiff's motion for a new trial the order was reversed on the ground that the evidence made the question of the wilful and wanton negligence of the defendant's motorman in charge of the car one of fact for the jury. Rawitzer v. St. Paul City Railway Co., 93 Minn. 84, 100 N. W. 665. The second trial resulted in a verdict for the plaintiff in the sum of one dollar. Thereupon the plaintiff made a motion for a new trial of the

[1] Reported in 103 N. W. 499.

[2] JAGGARD, J., took no part, having presided at first trial.

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cause on the ground of inadequacy of the damages. This was met by a counter motion by the defendant for judgment notwithstanding the verdict. The trial court made its order denying the motion for judgment and granting the motion for a new trial. The defendant appealed from the whole order.

It is too obvious to justify any discussion that the award of one dollar as the value of a father's pecuniary interest in the life of his son seventeen years old was a reproach to the administration of justice. It follows that the action of the learned trial judge in granting a new trial was right, unless the defendant was, as a matter of law, entitled to a directed verdict in its favor. This proposition is not contested by the defendant's counsel.

The sole question here to be decided, then, is whether the court erred in not directing a verdict for the defendant. The general facts of this case are stated in the opinion of this court on the former appeal, to which reference is here made for a clear statement of the law of the case. The evidence on the second trial on behalf of the plaintiff was substantially the same as on the first trial. The motorman in charge of the car, however, testified, in effect, that he did not discover the deceased in a place of danger until the car was within some forty feet of him, and that he then did all that it was possible to do to stop the car in time to save him. The motorman did not testify on the first trial as to the accident. The contention of the defendant is that upon the record as it now stands it was entitled to a directed verdict at the close of the case. If the evidence, without the motorman's testimony, made a case for the jury—as we must hold in view of the decision on the former appeal—his testimony could not make the question of the defendant's alleged negligence one of law to be decided by the court in its favor. The credibility of the motorman and the weight to be given to his testimony were for the jury. We hold that the defendant was not entitled to a directed verdict in its favor, and that the order granting a new trial was right.

Order affirmed.

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BELLE McKENZIE v. SARAH H. BANKS.[1]

May 12, 1905.

Nos. 14,274—(42).

Assault and Battery.

Action for assault and battery, in which the first trial resulted in a verdict for the plaintiff and a new trial granted for the reason that evidence was not sufficient to support the verdict. On the second trial the plaintiff had a verdict, and the court denied defendant's motion for judgment or for a new trial. *Held:*

1. The mere fact that the evidence was substantially the same on both trials did not entitle the defendant to a directed verdict on the second trial. The evidence justifies the order of the court denying conditionally the motion for a new trial.

2. Professional communications are not privileged if made in furtherance of a criminal purpose; but the court did not abuse its discretion in refusing to receive such communications in evidence, for the fact sought to be proven by them was only remotely relevant to the issue.

3. The court did not err in refusing to grant a new trial for misconduct of counsel.

Action in the district court for St. Louis county to recover $5,050 for assault. The case was tried before Dibell, J., and a jury, which rendered a verdict in favor of plaintiff for $1,450. From an order denying a motion for judgment notwithstanding the verdict, and denying a motion for a new trial on condition that plaintiff consent to a reduction of the verdict to $650, defendant appealed. Affirmed.

Roger S. Powell and *Washburn, Bailey & Mitchell,* for appellant.

Alexander Marshall and *Warner E. Whipple,* for respondent.

START, C. J.

This is an action for the recovery of damages which the plaintiff claims to have sustained as the result of an assault and battery committed upon her by the defendant at Duluth on May 12, 1903. The complaint alleged that the plaintiff was a married woman and pregnant at the time stated, and that the defendant wrongfully assaulted and pushed her upon a large wooden box, whereby she sustained serious in-

[1] Reported in 103 N. W. 497.

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juries, which resulted in miscarriage. The answer admitted that the plaintiff was a married woman, but put in issue every other allegation in the complaint. The first trial of the cause resulted in a verdict for the plaintiff for $2,050. The defendant then made a motion for judgment in her favor notwithstanding the verdict, or for a new trial. The court denied the motion for judgment, but granted the motion for a new trial upon the ground, among others, that the verdict was not justified by the evidence. The second and last trial resulted in a verdict for the plaintiff for $1,450, and the defendant made a motion for judgment notwithstanding the verdict, or for a new trial. The court made its order denying the motion for judgment and granting a new trial unless the plaintiff consented to a reduction of the verdict to $650 within ten days, but, if she so consented, the motion for a new trial should stand denied. She filed her written consent to such reduction within the time limited, and the defendant appealed from the whole order.

1. The first contention of the defendant is that the denial of the motion for judgment was error, because the evidence was substantially the same on the last trial as it was on the first one; hence at the close of the evidence on the second trial she was entitled, as a matter of law, to have a verdict directed in her favor; and, further, if this be not so, then it was error for the court to refuse a new trial. The controlling question is not whether the evidence was substantially the same on the second trial as it was on the first, but it is whether the evidence on the last trial made a case for the jury. An order granting a new trial because the evidence is not sufficient to sustain the verdict is one resting largely in the discretion of the trial court, and its effect is to set aside entirely the trial, with all of its evidence and proceedings, and the case then stands precisely as if no trial had ever been had. It follows, then, that the mere fact that a new trial is ordered on the ground that the evidence is not sufficient to sustain the verdict does not entitle the party in whose favor the order was made to a directed verdict on the second trial if the evidence is substantially the same as it was on the first trial. This brings us to the question whether the evidence on the trial now under review made a case for the jury.

The primary issue on the trial was whether the defendant pushed the plaintiff upon a box, as alleged in the complaint. The plaintiff and her

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husband testified directly and positively that the defendant did push her as alleged. It is undisputed that she had a miscarriage some three days after the alleged assault. On the other hand, the defendant and her husband testified that she did not push or touch the plaintiff, and in this they were corroborated by some six or eight witnesses, who were in a position to see what took place, each of whom testified that defendant did not strike or push the plaintiff. This does not present a case which rests upon mere conjecture, as did the cases of Brennan Lumber Co. v. Great Northern Ry. Co., 80 Minn. 205, 83 N. W. 137, and Baxter v. Covenant Mut. Life Assn., 81 Minn. 1, 83 N. W. 459, and other similar cases, but it is one where the plaintiff's cause of action is clearly and positively proven by direct testimony, which is not intrinsically improbable. True, the testimony is contradicted by a cloud of witnesses, but the credibility of the witnesses was a question of fact for the jury. Two juries have found by their respective verdicts that the plaintiff and her witness told the truth, and in so doing they determined simply a question of fact. The defendant was not entitled to a directed verdict, for the trial court could not, as a matter of law, rule that the plaintiff and her witness were not entitled to credence. It must, however, be conceded that the record shows that the verdict is against the weight of the evidence, but is not so palpably so as to suggest that the trial court abused its discretion in denying the second motion for a new trial of the action. We accordingly hold that it was not error for the trial court to deny a new trial on the ground that the verdict was not sustained by the evidence.

2. Defendant called as a witness a physician, who testified that the plaintiff called upon him in March before the alleged assault; that he did not prescribe for her, or treat her, and that he received no information from her which was necessary to enable him to prescribe or act for her. The defendant then offered to prove by the witness that the plaintiff told him that she was with child, and asked him to produce a miscarriage upon her, not, however, on account of her health, but because she had too many children, and did not want any more; and, further, that the request was refused by the witness. The evidence was objected to by the plaintiff as incompetent and immaterial, and for the further reason that it was an attempt to prove a privileged communication. The objections were sustained, and the ruling is here assigned as error.

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The evidence was not privileged. The statute (G. S. 1894, § 5662, subd. 4) provides that:

> A regular physician or surgeon cannot without the consent of his patient be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.

It is clear that the communication to the physician sought to be proved by him was not acquired by him in attending the plaintiff, nor was it necessary to enable him to prescribe or act for her within the meaning of this statute. If the plaintiff made the statement assumed in the offer, it was nothing more than an open request to the physician to join in a conspiracy to commit a vile crime, and it falls within the rule that professional communications are not privileged if made in furtherance of a criminal purpose. 23 Am. & Eng. Enc. (2d Ed.) 88; People v. Van Alstine, 57 Mich. 69, 23 N. W. 594. The offered evidence, however, related to a collateral matter, and it was only admissible in case it was within the rule that, where there is a conflict in the testimony of witnesses upon matters relevant to the issue, any evidence is admissible which tends to show that the testimony of the witnesses on one side of the issue is more reasonable than that of the other side. But in the application of this rule a fair discretion must be allowed to the trial court, and evidence of such collateral facts received with caution. Glassberg v. Olson, 89 Minn. 195, 94 N. W. 554; Philips v. Mo, 91 Minn. 311, 97 N. W. 969. Now, the proposed evidence had only a slight tendency, if any, to show that the testimony of the defendant and her witness as to the issue whether she pushed the plaintiff was more reasonable than that on behalf of the plaintiff, for the fact sought to be proven was only remotely connected with the issue. Whether it would have been error for the court to have admitted the evidence we are not called upon to determine, but we are clearly of the opinion that the court did not abuse its discretion in rejecting the evidence.

3. The defendant's counsel asked a witness this question:

> Were you or were you not in such a position that you would have seen Mrs. Banks touch Mrs. McKenzie if she had done so?

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This was objected to on the ground that it called for the conclusion of the witness. The objection was sustained, and the ruling is assigned as error, for the reason that the question called for a fact, not a conclusion. It called for a conclusion, and the ruling was technically correct. Hathaway v. Brown, 22 Minn. 214. Several other alleged errors in the rulings of the court as to the admission of evidence are urged. We do not find prejudicial error in any of the rulings.

4. The plaintiff's counsel, in his argument to the jury, made some reference to the result of the first trial. The conduct of counsel was censurable, but in view of the action and instructions of the court there is no reason to believe that the conduct of counsel was prejudicial.

Order affirmed.

M. H. FURESETH v. GREAT NORTHERN RAILWAY COMPANY.[1]

May 12, 1905.

Nos. 14,277—(101).

Trial in Justice Court—Legal Holiday.

Upon the return day of a summons by a justice of the peace defendant appeared by attorney, answered the complaint, and stipulated for an adjournment of the case to May 30. At the adjourned date both parties appeared, plaintiff ready for trial, and defendant moved to dismiss the action on the ground that the court had no jurisdiction to proceed to trial on a legal holiday, which motion was denied.

The decision was based on the fact that plaintiff had appeared for trial, would otherwise be subject to considerable expense, and upon the stipulation of the parties.

Held, the facts were sufficient to justify the justice in holding that a necessity existed, as provided by section 7987, G. S. 1894.

Appeal by defendant from a judgment of the district court for Polk county, entered pursuant to the findings and order of Watts, J., affirming a judgment of a justice of the peace in favor of plaintiff for $62.90. Affirmed.

[1] Reported in 103 N. W. 499.

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A. C. Wilkinson and *Robert A. Hastings,* for appellant.
W. E. Rowe, for respondent.

LEWIS, J.

Action for damages for failure to deliver baggage belonging to respondent which had been delivered to appellant for transportation from Grand Forks to Fosston.

Summons in the action was issued by a justice of the peace of Fosston, and made returnable May 23, 1904, when appellant appeared by its attorney, and answered orally to the complaint, and the following proceedings took place: Respondent's attorney asked for an adjournment, and appellant's attorney said any day would suit him on which to try the case except a certain day, which the return of the justice does not disclose. Respondent's attorney then asked appellant's attorney if May 30 would suit him, and he replied that it would. Thereupon the justice adjourned the case accordingly, and made the following entry in his docket:

> By stipulation in open court case adjourned until May 30, 1904, at my office in the village of Fosston, Polk county, Minnesota, at eleven o'clock a. m.

On the adjourned day appellant appeared by its attorney, and objected to any further proceedings being taken on the ground that May 30 was a legal holiday, and that the court had lost jurisdiction to proceed with the trial, and the justice made the following entry:

> It [having] appeared to the court that the plaintiff lives more than ninety miles from the place of trial, and that it would entail a large expense to dismiss this case and have the plaintiff bring another action, and that it is the interest of justice that this trial be now had, defendant's objection overruled.

Respondent introduced evidence in support of his case, and appellant took no further part in the trial. Judgment was entered in favor of respondent, whereupon appellant appealed to the district court upon questions of law alone. The district court affirmed the judgment, from which appellant appealed to this court.

Appellant submits that the judgment was void because it conclusively appears from the record that there was no necessity for con-

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ducting the trial on May 30. The question is fully answered in the case of State v. Sorenson, 32 Minn. 118, 19 N. W. 738, where the trial began February 19, and continued from day to day until the 22d, a legal holiday, when it was submitted to the jury. It was held that in judicial proceedings the necessity of transacting the particular business on a holiday must be conclusively presumed to have been presented to and passed upon by the court.

The record here shows that May 30 was selected by stipulation of the parties, and the case adjourned to that date for the convenience of all concerned. Respondent having prepared for trial and appeared with his witnesses, appellant was in no position to disregard the stipulation. In overruling appellant's objection the court decided that under all the circumstances it was necessary to proceed with the trial. The decision of the justice seems to have been based upon the convenience of the parties and to save expense. Those were proper considerations, and sufficient, within the meaning of the statute (G. S. 1894, § 7987), to support the decision. This is not a case where all business is absolutely prohibited upon Sunday or a legal holiday, according to the statutes of some states.

Judgment affirmed.

ELWIN A. POPE v. L. B. WAUGH and Another.[1]

May 12, 1905.

Nos. 14,321—(149).

Action by Foreign Administrator.

The failure of a foreign administrator, before commencing an action in this state, to file a copy of his letters of administration in the office of the probate court of the county in which the action is brought, affects merely his capacity to sue in our courts, and is waived, unless objection is taken by answer or demurrer, as provided by section 5235, G. S. 1894.

[1] Reported in 103 N. W. 500.

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Waiver of Objection.

The failure to file such copy does not appear upon the face of the complaint in this action, and, objection not having been made by answer, defendant waived it.

Case Distinguished.

Fogle v. Schaeffer, 23 Minn. 304, distinguished.

Appeal by plaintiff from a judgment of the district court for Hennepin county dismissing the action, entered pursuant to the order of Willard R. Cray, J. Reversed and new trial granted.

W. W. Fry and *Everett Moon,* for appellant.

Charles H. Howard, for respondents.

BROWN, J.

This action was brought by plaintiff, as a foreign administrator, to recover upon a promissory note belonging to the estate of his intestate. The complaint alleged that, on the date therein stated, defendants made and delivered to Florus C. McKay a promissory note for the sum of $500; that Florus C. McKay died in the state of Iowa on June 2, 1902; that thereafter, in the district court of Polk county, in that state, that court having jurisdiction, plaintiff was duly appointed administrator of his estate; that he subsequently duly qualified as such, and entered upon the discharge of his duties. There was no allegation that a copy of the letters of administration was, prior to the commencement of the action, filed in the office of the probate court of Hennepin county, this state, the county where the action was brought, as required by section 5917, G. S. 1894. The answer was a general denial. At the trial plaintiff offered evidence to sustain the allegations of the complaint, and rested his case. Defendants then affirmatively proved the failure of the administrator to file a copy of the letters of administration in this state, and moved the court for a dismissal of the action, on the ground that the failure to file such copy was fatal to plaintiff's right of recovery. The court granted the motion, judgment was ordered for defendants, and plaintiff appealed.

The order appealed from must be reversed. The failure of plaintiff to file the certified copy of his letters of administration went to his capacity to sue, and, not having been raised by answer, was waived. Section 5235, G. S. 1894, provides, in effect, that, when the legal ca-

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pacity of the plaintiff to sue does not affirmatively appear upon the face of the complaint, objection must be taken by answer; if it does affirmatively appear, it must be taken by demurrer. Want of capacity to sue did not affirmatively appear from the complaint in this case, and the objection, not having been raised by answer, was, under this statute, waived.

The learned court below cited and relied upon the case of Fogle v. Schaeffer, 23 Minn. 304. But that case is clearly distinguishable. In that action the complaint affirmatively alleged that a copy of the plaintiff's letters of administration had been duly filed in the proper office in this state. This allegation was denied by defendant's answer, thus putting the question in issue. Plaintiff failed to prove the fact so alleged, and the court held that it was fatal to his right of recovery. The objection there was sufficiently raised by the denial in the answer of the express allegation in the complaint that a copy of the letters had been filed. But no such issue was made by the pleadings in the case at bar. The case of Hamilton v. McIndoo, 81 Minn. 324, 84 N. W. 118, cited by respondents, is not in point. The only question decided in that case was that the complaint was defective in not containing a proper allegation of the appointment of plaintiff as administrator. The question whether a copy of his letters of administration should have been filed was not involved.

This is not a case in which it would be proper for the court to order final judgment as urged by appellant.

Judgment reversed and new trial granted.

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J. O. CAVANAUGH v. SIMPSON S. FENLEY.[1]

May 19, 1905.

Nos. 14,266—(75).

Liens Obtained Against Person Adjudged Bankrupt.

Section 67, subd. f, of the Bankruptcy Act of 1898, providing that "all levies, judgments, attachments or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt," applies to both voluntary and involuntary proceedings against the debtor.

Garnishment.

A garnishment of funds belonging to an insolvent person within four months of the time he is adjudged a bankrupt is, within the meaning of the bankruptcy act, dissolved and rendered null and void by the bankruptcy proceedings, and this result follows notwithstanding the insolvent person made no reference in his schedule of assets to the fact that the indebtedness had been garnished.

Judgment against Bankrupt.

A judgment entered against an insolvent person after he is adjudged a bankrupt, and before his final discharge in the bankruptcy proceedings, upon a provable claim existing at the time he was adjudged a bankrupt, and from liability for the payment of which he was relieved by his discharge, is cancelled and annulled by such discharge, and the bankrupt has the absolute legal right, after obtaining his discharge, if he proceeds with reasonable diligence, to have execution upon the same perpetually stayed.

Action in the municipal court of St. Paul to recover $167 for medical services, the Chicago Great Western Railway Company being garnished and disclosing an indebtedness to defendant of $139.35. Judgment by default upon a substituted service of summons was entered against defendant. From an order, Finehout, J., denying a motion to vacate the judgment and to restrain further proceedings thereon on the ground that he had received his discharge in bankruptcy instituted on his voluntary petition filed within four months after the commencement of the action, defendant appealed. Reversed.

[1] Reported in 103 N. W. 711.

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J. M. Hawthorne and *Lloyd Peabody,* for appellant.
D. J. Keefe, for respondent.

BROWN, J.

The facts material to the questions controlling the decision in this case are as follows: The action was commenced in the municipal court of St. Paul on August 14, 1903. Defendant being a nonresident, summons was served upon him by publication. The garnishee summons was served upon the garnishee, and it appeared by its attorney at the time specified therein, August 25, 1903, and disclosed that it was indebted to defendant in the sum of $139.35. It also, in connection with and as a part of the disclosure, stated that defendant was a married man, and resided in the state of Iowa. On September 17, 1903, within the period of four months from the commencement of the action, defendant was on his own petition adjudged a bankrupt by the United States District Court for the Northern District of Iowa. Such proceedings were thereafter had in that court that he was on March 9, 1904, duly discharged. Defendant scheduled and disclosed the indebtedness due him from the garnishee in the bankruptcy proceedings, and claimed the same as exempt under the laws of the state of Iowa, where he resided. No nonexempt property being disclosed by the bankrupt, no trustee of his estate was appointed, but the proceedings in bankruptcy were in all things regular, and his discharge in accordance with the bankruptcy act. On October 1, 1903, default judgment was entered against defendant, but no judgment was entered against the garnishee until June 11, 1904, and after defendant's discharge had been issued to him.

Defendant moved the court below for an order discharging the garnishment and releasing to him the money held thereunder, and for an order perpetually enjoining further proceedings on the judgment in the main action, or that it be vacated and defendant permitted to answer, setting up his discharge in defense. The motion was denied, and defendant appealed.

The record presents two principal questions: (1) Whether the garnishment proceedings were dissolved by operation of law by the bankruptcy proceedings; and (2) whether the court erred in denying the motion perpetually to enjoin collection of the judgment against defend-

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ant. If these questions be answered in the affirmative, the order appealed from must be reversed.

1. Section 67, subd. f, of the Bankruptcy Act of July 1, 1898, c. 541, 30 St. 565 [U. S. Comp. St. 1901, 3450], provides:

> That all levies, judgments, attachments or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien, shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt.

There is no ambiguity in this provision of the act, and it would seem to require no discussion to demonstrate that it means what its plain language imports. But it is urged by plaintiff that it has no application to the case at bar, for the reason that defendant became a voluntary bankrupt; that, as the bankruptcy proceedings were initiated and conducted to a conclusion on his voluntary petition, the case does not fall within the scope or purpose of the section, construed in connection with the whole act. In other words, his contention is that this provision of the law applies solely to involuntary bankrupts. Several cases in the United States District Court are cited to sustain this contention. In re Delue (D. C.) 91 Fed. 510; In re Easley (D. C.) 93 Fed. 419; In re O'Connor (D. C.) 95 Fed. 943. They fully bear out respondent's contention; but, it seems to us, they are at variance with the whole purpose and object of the bankruptcy act, and should not be followed. The contrary rule was laid down by the United States Circuit Court of Appeals, Seventh Circuit, in Re Richards, 96 Fed. 935, 37 C. C. A. 634. It was there held that the section of the bankruptcy act above quoted, properly construed, applied to voluntary as well as involuntary cases; the decision being based in part upon section 1, subdivision 1, of the act of July 1, 1898, c. 541, 30 St. 544 [U. S. Comp. St. 1901, 3418], which provides that a person "against" whom a petition has been filed shall include a person who has filed a voluntary petition.

We think this decision, which is well considered, and by a court higher in authority than the federal District Court, settles the law on

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this subject, and must be our guide in disposing of the case at bar. To sustain plaintiff's contention would open the door to gross frauds. If this provision of the act were to be held inapplicable to cases of voluntary bankruptcy, it would facilitate the efforts of insolvent persons to make preferences and prevent a fair distribution of their property among all their creditors. A person in contemplation of bankruptcy proceedings could induce a number of his creditors, whom he chose to prefer, to bring actions against him, attach and levy upon his property, thereafter file a petition in bankruptcy, and thus secure to them an unfair advantage—a condition the bankruptcy act intended to provide against. We adopt the view that this provision of the act, properly construed, applies to both voluntary and involuntary cases, and that the learned trial court erred in ordering judgment against the garnishee for the indebtedness owing from it to defendant. The garnishment proceedings were, as a matter of law, rendered null and void by the judgment of the United States court adjudging defendant a bankrupt, and the effect and operation of the law was not changed by the failure of defendant, in his schedule of assets, to disclose the fact that the indebtedness had been garnished. The indebtedness to him was disclosed, and he asserted a claim of exemption thereto under the statutes of Iowa.

2. The second question presented is whether the court below erred in denying the motion perpetually to enjoin further proceedings on the judgment, or vacate it for the purpose of enabling defendant to answer and defend in the action. As heretofore stated, the action was commenced before defendant filed his petition in bankruptcy, within the period of four months from that time, but the judgment was rendered against him subsequently, and long before he obtained his discharge. He, therefore, was in no position, and had no opportunity, to set up his discharge in defense, and the record before us discloses that he applied to the court below to obtain the benefits thereof within a reasonable time after he secured it. The discharge was issued to him on March 9, 1904, and, from the 24th of that month until the final hearing on the motion here under review, he was before the court below at different times, on various motions seeking to effectuate his discharge. A discharge in bankruptcy releases the bankrupt from all liability for debts existing at the time he was adjudged a bankrupt,

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except certain classes of debts, to which the debt here in question does not belong—a result of which the bankrupt cannot rightly be deprived. If an action be brought against him upon a claim existing at the time he was adjudged a bankrupt, his discharge, properly pleaded, is a complete defense, and it should not be in the power of a creditor to nullify the objects, purposes, and results of proceedings under the bankruptcy act by causing judgment to be entered before the bankrupt receives his final discharge. The debt here under consideration existed at the time defendant filed his petition in bankruptcy, was provable in the bankruptcy court, and its character was in no way changed by the entry of the judgment. It remained the same debt, changed only in form.

It is true that defendant could have obtained from the court below a stay of proceedings, in the action in which the judgment was rendered, pending the administration of his estate in the bankruptcy court, but his failure in this respect is not fatal to his right to insist that effect be given to his discharge, nor does it matter that he made a general appearance in that action before or after the entry of the judgment; his release is just as effectual.

This precise question has been before the courts of other states and before the supreme court of the United States under the old bankruptcy act, which, in the respects here under consideration, was the same as the present act, and relief was awarded to the bankrupt similar to that here applied for. In Boynton v. Ball, 121 U. S. 457, 7 Sup. Ct. 981, the court had before it a case substantially like that at bar, and it was held that the judgment entered against the bankrupt after he was adjudged a bankrupt, and before his discharge, was canceled and annulled by the final discharge. It was so held in Huntington v. Saunders, 166 Mass. 92, 43 N. E. 1035; Sanderson v. Daily, 83 N. C. 67; Blair v. Carter, 78 Va. 621. It has also been held by many of the authorities that in such cases the bankrupt may have from the court rendering the judgment an order perpetually staying execution on the judgment, even though no stay of proceedings in the action was obtained pending the proceedings in the bankruptcy court. Palmer v. Hussey, 119 U. S. 96, 7 Sup. Ct. 158; Palmer v. Hussey, 87 N. Y. 303; Smith v. Kinney, 6 Neb. 447; Leonard v. Yohnk, 68 Wis. 587, 32 N. W. 702.

The rule laid down in these cases harmonizes with the purpose of the bankruptcy act, and gives force and effect to the discharge of the

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bankrupt, and we apply it in the case before us. It follows that the learned court below erred in refusing a perpetual stay of execution upon the judgment, there being no question but that defendant was by his discharge released from liability for the debt upon which it was founded.

It is unnecessary to consider whether the indebtedness due from the garnishee was exempt to defendant under the statutes of the state of Iowa; that is not a controlling question. Whether exempt or not, plaintiff has no legal or valid claim against it. The garnishment by which it was held was dissolved when defendant was adjudged a bankrupt, and he was released from liability to plaintiff for the indebtedness due him by his final bankruptcy discharge, so that plaintiff has neither the garnishment nor a claim against defendant upon which to base a right to contest the asserted exemption.

Order reversed.

W. E. MEYERS v. GEORGE McALLISTER and Another.[1]

May 19, 1905.

Nos. 14,282—(62).

Competency of Witness.

The question of the competency of a witness to give opinion evidence is a preliminary one for the trial judge, and rests largely in his discretion. His decision thereon will not be reversed where there is any evidence fairly tending to show competency, or where the witness is held incompetent, unless the decision is manifestly against the weight of the evidence.

Evidence—Value.

The trial court did not err in receiving opinion evidence as to the value of the property here in question.

Evidence—Itemized List of Chattels.

It was not reversible error to receive in evidence a list of personal property, containing several hundred different items, shown to be correct by the testimony of the party who made it, without formal and direct proof that he could not testify to the details independently of the list, it being obvious upon its face that he could not do so.

[1] Reported in 103 N. W. 564.

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Evidence—Lien on Goods Sold.

An unpaid seller of goods has a lien on them while he is in possession thereof, but the lien is divested by a delivery, unless there is a contract to the contrary. Rule applied, and *held*, that an offer of evidence to prove a seller's lien upon goods which had been delivered was properly excluded, for the reason that there was no offer to prove an agreement that the lien should continue notwithstanding the delivery.

Appeal by defendants from an order of the district court for Itasca county, McClenahan, J., denying a motion for a new trial. Affirmed.

C. C. McCarthy and *Alfred L. Thwing,* for appellants.

Frank F. Price, for respondent.

START, C. J.

Action to recover possession of certain personal property, consisting of a logging outfit. The complaint alleged the plaintiff's ownership of the property, its value, and that the defendants on November 15, 1903, at Blackduck, this state, took the property from his possession, and detains the same. The answer admitted the taking of a portion of the property, and alleged that the part taken was of the value of $488.20, and no more, and claimed to justify the taking by virtue of an alleged seller's lien on the property. The reply put in issue the new matter alleged in the answer. Verdict for the plaintiff that he was entitled to the possession of the property described in the complaint, and that the value thereof was $600. The defendants appealed from an order denying their motion for a new trial.

1. The first contention of the defendant to be considered is that the trial court erred in receiving the testimony of two witnesses called by the plaintiff as to the value of the property, for the reason that neither was shown to be competent to give an opinion as to such value. An analysis of the evidence shows that there was but little controversy between the parties as to the aggregate value of the whole property, although there were material discrepancies as to particular items, and that the value as established by the verdict is not materially greater, excluding interest, than the aggregate estimates of the value given by one of the defendants. But this aside, there was no reversible error in the ruling of the trial court as to the competency of the witnesses, for the question of the competency of a witness to give expert evidence

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is a preliminary one for the trial judge, and rests largely in his discretion. His decision of the question will not be reversed where there is evidence fairly tending to show competency, or where the witness is held to be incompetent, unless the decision is manifestly against the weight of the evidence. Papooshek v. Winona & St. P. R. Co., 44 Minn. 195, 46 N. W. 329; Blondel v. St. Paul City Ry. Co., 66 Minn. 284, 68 N. W. 1079; Yorks v. Mooberg, 84 Minn. 502, 87 N. W. 1115.

The evidence as to the competency of the witnesses, while not entirely satisfactory, was sufficient to sustain the decision of the trial judge, when tested by the rule stated.

2. The plaintiff called as a witness his clerk, who superintended the storing of the greater part of the property in question with a third party, from whose possession the evidence tended to show the defendants took the same property. The witness testified to the effect that when he stored the goods a list of the different articles was made and checked over by him, and that he knew the list to be correct. A true copy of this list made by the witness was, upon proof being made of the loss of the original, received in evidence, over the objection of the defendants that no foundation had been laid for its introduction. This is urged as error, for the reason that there was nothing in the record to furnish a foundation for the admission in evidence of the list. No point is here made that a verified copy was received in place of the original. See Insurance Companies v. Weides, 14 Wall. 375. It is, however, urged that the witness did not testify, nor was it otherwise shown, that he was unable to specify the several items or articles of property so stored from his recollection, without being obliged to rely upon the list.

The general rule is, as stated by defendants' counsel in his exhaustive brief, that an ordinary memorandum is not admissible in evidence, unless a foundation be first laid by the testimony of the witness who made it that he knows it to be correct. It must also be made to appear to the satisfaction of the trial judge that the witness cannot testify to the details shown by the memorandum independently of it. Ordinarily such fact can best be, and ought to be, shown by the direct testimony of the witness who made the memorandum, but the rule is not inflexible. Stahl v. City of Duluth, 71 Minn. 341, 74 N. W. 143.

In this case the witness was not asked whether he could testify of

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his own recollection to the detailed items of the property contained in the list independently of it. The list, however, upon its face, satisfactorily shows that he could not truthfully so testify, for it was a list of some six hundred different items of personal property. Clearly it was not error to receive the list or memorandum in evidence because the witness did not testify to a fact which was obvious on the face of the memorandum.

3. The defendants offered to prove certain facts, stating them in detail. The offer was objected to by the plaintiff as immaterial, and the objection was sustained. It is urged that the ruling was error, for the reason that the offer was in effect one to prove a seller's lien on the personal property. An unpaid seller of goods has a lien on them while he is in possession thereof, but the lien is divested by a delivery, unless there is a contract, express or implied, to the contrary. Now, it is undisputed in this case that the plaintiff purchased the personal property in question from the defendants, and that it was delivered to him. The defendants' offer was somewhat obscure, but it included no offer to prove an agreement between the parties that the seller should retain his lien notwithstanding the delivery of the property. It follows that the trial court rightly excluded proof of the offer, for it was immaterial.

There are no other assignments of error meriting special consideration.

Order affirmed.

WILLIAM ROSS v. L. J. CALE.[1]

May 19, 1905.

Nos. 14,286—(67).

Mortgagor Buying Tax Title.

A mortgagor who has expressly covenanted to pay the taxes on mortgaged premises is not thereby prohibited from acquiring a tax title thereon, if the same does not affect interests or rights arising from or accruing under the mortgage, as shown by the facts in this case.

[1] Reported in 103 N. W. 561.

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Action in the district court for Stearns county to determine the adverse claim of defendant to land in possession of plaintiff. Plaintiff, the grantee of Robert Ross, the original owner, claimed title by adverse possession under a tax certificate subsequently issued and afterwards purchased by him. Defendant claimed title by virtue of a sale of the land under an execution issued upon a judgment against Robert Ross which was an existing lien at the time of the execution of the latter's deed to plaintiff. Prior to his conveyance to plaintiff, Robert Ross had given a mortgage upon the land to defendant, which mortgage contained a covenant to pay taxes. This mortgage was afterwards assigned by defendant to one Foster, and no claim of title was asserted thereunder. The case was tried before Searle, J., who found in favor of plaintiff. From an order denying a motion for a new trial, defendant appealed. Affirmed.

A. E. Bowe, for appellant.

Possession of the mortgagor, or his grantee, is presumed to be subordinate to the mortgage, until it is shown by some act that such possession is inconsistent with the rights of the mortgagee. Lowry v. Tilleng, 31 Minn. 500; Maxwell v. Hartmann, 50 Wis. 660; Avery v. Judd, 21 Wis. 262; Seeley v. Manning, 37 Wis. 574, 581. A grantee succeeds to the estate, and occupies the position of his grantor. He takes subject to the incumbrance, and his title and possession are no more adverse to the mortgagee than was the title and possession of the mortgagor. 1 Cyc. 1070; Jones, Mort. § 1211; Choteau v. Riddle, 110 Mo. 366. Plaintiff did not and could not obtain, nor can he be heard to assert, any right, title or interest in, or to, the land by virtue of the tax certificate of 1884 for the taxes of 1883, purchased by him. Allison v. Armstrong, 28 Minn. 276; MacEwen v. Beard, 58 Minn. 176; Washington Loan & Trust Co. v. McKenzie, 64 Minn. 303; American Baptist Missionary Union v. Hastings, 67 Minn. 303; Norris v. Ile, 152 Ill. 190.

Calhoun & Bennett, for respondent.

Defendant not claiming any rights under the mortgage, is not in a position to question plaintiff's rights to acquire a tax title or his adverse possession. Assuming that plaintiff could acquire no rights un-

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der his tax title or by adverse possession as against the mortgagee, defendant can take no advantage of this. Dean v. Goddard, 55 Minn. 290.

LOVELY, J.

Action to determine adverse claims to real estate, plaintiff being in possession. The court, as a finding of fact, determined that defendant had no right or interest in the property, and held, as a conclusion of law, that he was entitled to judgment to that effect. This appeal is from a motion denying a new trial.

Defendant criticises the action of the trial court in failing to find specifically upon the question of plaintiff's alleged adverse possession, which was litigated at the trial. There was no request for further instructions upon this issue, and, under the view adopted by this court, the title acquired by adverse possession is a title in fee simple, and is as perfect as a title by deed. Dean v. Goddard, 55 Minn. 290, 56 N. W. 1060; Sage v. Rudnick, 67 Minn. 362, 69 N. W. 1096. Hence the finding, if established by evidence tending to show open and hostile possession of the property in suit for the period prescribed by statute, is sufficient.

An examination of the record discloses that the defendant claims title through an execution sale on June 17, 1884, on a judgment docketed October 10, 1883, against Robert Ross, the original owner. There was no redemption, and whatever title defendant acquired and asserts is by reason thereof.

On September 24, 1883, Robert Ross mortgaged the land to defendant in this action to secure a note due in three months. The mortgage contained a covenant to pay taxes. In 1881 it appears from the evidence that the owner left the land. On November 16, 1883, he executed to plaintiff, William Ross, a warranty deed of the premises. The mortgage and note from Robert Ross to defendant was by the latter assigned and transferred to one O. C. Foster April 1, 1884. The taxes for 1883 were not paid, and in proceedings to collect the same the land was sold for taxes by the county auditor on September 15, 1884, and bid in by one W. B. Mitchell on the 26th of that month. It appears that the purchaser caused a notice of expiration of redemption to be served on the plaintiff on October 23, 1886. Plaintiff went upon

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the land in 1887, and broke and cleared three or four acres. From time to time before suit he broke up more land, in all amounting to fourteen acres, which was cropped; there being rye on the place at the time of the trial. Immediately after plaintiff went upon the land he built a fence of posts and two barbed wires around it, but soon after removed it to take advantage of the herd law in force in that locality. Plaintiff allowed the land to be sold for taxes, and bid the same in each year from 1885 to the time of the suit excepting the year 1883. These sales, with the exception of the year 1883, were all redeemed by defendant on July 11, 1902. In 1886, before plaintiff's alleged adverse possession commenced, he purchased the outstanding tax certificate issued to Mitchell, which contained a specific description of the property in question. He relied upon this instrument at the trial to protect his title, since it described the land, and indicated the extent of his asserted adverse possession thereto.

The colorable title under the tax certificate applied to the entire tract, which, taken in connection with the land broken, cultivated, and cropped, characterizes the extent of the possession, and applies to the whole thereof. Barber v. Robinson, 82 Minn. 112, 84 N. W. 732.

But it is insisted that the plaintiff in this case was not authorized to set up the claim of adverse possession, for the reason that he was the grantee of Robert Ross, who had in 1883 mortgaged the property to defendant, and that the purchase of an outstanding tax title must be treated as the performance of a duty which he owed to the defendant, who was the mortgagee. Conceding that, if such privity of relationship existed between the mortgagor and his grantee to the mortgagee, it forbids the former from acquiring a hostile tax title to the latter, it is very clear that this is not the case at bar. Defendant, Cale, who took the mortgage from Robert Ross in 1883, sold and transferred the same to Foster in 1884, thus parting with all interest he had in the note and mortgage, and relied solely and explicitly upon the title that he obtained under the execution sale. What became of the mortgage to Foster does not appear, but from the time it was transferred to the latter there existed no privity of relationship between the defendant and Robert Ross, the mortgagor, and necessarily the plaintiff. From the time the plaintiff's adverse possession commenced, in 1887, the rights, duties, and obligations between the grantee of Robert Ross and the

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defendant Cale had ended, and plaintiff could not be said to be debarred from acquiring adverse possession by deed from the state against an execution creditor. Hence the adverse possession of the entire tract rests upon sufficient evidence to sustain it.

It was suggested that the plaintiff, while in possession of the land, allowed the same to go to sale for taxes, and that his purchase of the title thereto was inconsistent with an asserted claim of ownership therein. We conceive that there is nothing in this proposition, since the owner of land under legislative sanction may purchase without prejudice to any interest of this character. G. S. 1894, § 1599.

The order appealed from is affirmed.

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HENRY W. PITZ and Another v. KENTUCKY & NORTHERN DISTILLING & CATTLE FEEDING COMPANY.[1]

December 23, 1904.

Nos. 14,172—(57).[2]

Evidence.

The evidence in this case sustains the verdict, and the trial court did not err in its charge to the jury.

Appeal by defendant from an order of the district court for Hennepin county, Harrison, J., denying a motion for judgment notwithstanding the verdict or for a new trial, after a trial and verdict in favor of plaintiffs for $87.43. Affirmed.

M. C. Brady, for appellant.

John F. Byers, for respondents.

PER CURIAM.

This action was brought in the district court of the county of Hennepin to recover $75.12 from the defendant for goods alleged to have been sold by the plaintiffs to the defendant. The answer alleged that the defendant purchased the goods in question of a third party, and paid him therefor, without any knowledge that the goods were the property of the plaintiffs. The cause was submitted to a jury, and a verdict returned for the plaintiffs for the amount claimed. The defendant appealed from an order denying its motion for judgment notwithstanding the verdict or for a new trial.

All of the assignments of error discussed in appellant's brief relate to questions whether the verdict is justified by the evidence, and whether the court erred in its charge to the jury. The assignments of error not urged in the brief are waived. Minneapolis, St. P. & S. S. M. Ry. Co. v. Firemen's Ins. Co., 62 Minn. 315, 64 N. W. 902. If there was evidence in the case fairly tending to establish the plaintiffs' alleged cause of action, there was no reversible error in the charge of the court to the jury. The real question, then, is whether the verdict is sustained by the

[1] Reported in 101 N. W. 797.

[2] October, 1904, term.

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evidence. The appellant insists that it is not. We have examined the record, and find that the evidence is sufficient to sustain the verdict.

Order affirmed.

HERMAN PRAHL v. ERNEST RENNEKE.[1]

January 20, 1905.

Nos. 14,089—(31).

Appeal by defendant from an order of the district court for Sibley county, Cadwell, J., denying a motion for a new trial. Affirmed.

Thomas Hessian, for appellant.

W. H. Leeman, for respondent.

PER CURIAM.

This was an action of ejectment, in which the plaintiff's right to recover depends upon the determination of the true boundary line between two farms and involves a small piece of land, and more particularly upon the establishment by plaintiff of his alleged adverse possession of the property in dispute for a period of fifteen years prior to the commencement of the suit. A large amount of testimony was taken at the trial. The issue was submitted to a jury, who found that plaintiff was entitled to recover the disputed strip.

The controversy on this appeal involves purely a consideration of the facts, and an attempt by defendant to show that by the great preponderance of the evidence the jury erred in their conclusion. This question was reviewed by the trial court, who denied a motion for a new trial. After a careful and patient review of the entire record, we cannot say that the verdict was so palpably against the weight of evidence that we are required to reverse the denial of the application for a rehearing.

Order affirmed.

[1] Reported in 102 N. W. 1134.

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CHARLES WERNER and Another v. JOSEPH POPP.[1]

April 20, 1905.

Nos. 14,145—(193).

A reargument having been granted, the following opinion was filed.

PER CURIAM.

Upon the reargument in this case it was conceded that the facts stated in the opinion[2] were substantially accurate. This was undoubtedly the case, although more prominence might have been given to the claim practically admitted that in the improvement of his land defendant's ditch followed the natural course of drainage.

Counsel for plaintiff has urged with much ability that it is our duty to overrule previous cases in this court under which it had been held that the upper proprietor, subject to the limitations therein stated, may transfer surface water by artificial means to a lower proprietor, thus imposing upon the latter the burden of getting rid of the same in a similar manner until the waters thus turned upon him reached their natural outlet and are thence disposed of. After considering fully the arguments and reasons that have been urged for the reversal of the doctrine already adopted in this state a majority of the court are not disposed to unsettle the rule of law already established and therefore adhere to the decision as originally filed.

Order affirmed.

[1] Reported in 103 N. W. 164.
[2] See opinion on page 118, supra.

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ELLING ISAKSON and Another v. OLE NELSON.[1]

January 20, 1905.

Nos. 14,212—(173).

Appeal by defendant from an order of the district court for Freeborn county, Kingsley, J., denying a motion for judgment notwithstanding the verdict or for a new trial, after a trial and verdict in favor of plaintiffs for $148. Affirmed.

John Anderson, for appellant.

Dunn & Knatvold and *Morgan & Meighen,* for respondents.

PER CURIAM.

The complaint in this action alleged that one S. L. Nelson and defendant entered into a certain contract, which provided for the farming of defendant's land for the period of five years, upon certain terms; that thereafter the contract was duly assigned to plaintiffs, who entered into possession thereof and made demand upon defendant to carry out his part of the contract and furnish the seed grain for 1900. The action was brought to recover damages for failure to furnish the seed, and to recover the value of preparing the soil therefor.

The answer admitted the execution of the contract and the assignment thereof to plaintiffs, admitted the demand upon defendant for the seed grain, and alleged that defendant was and had been willing and ready to furnish the same, and had made tender thereof to plaintiffs, who wilfully and negligently refused to accept the same. As a counterclaim, it was alleged that after the assignment of the contract to plaintiffs they wilfully and negligently refused to perform their part thereof, to the damage of defendant. The cause was tried before a jury, and a verdict rendered in favor of plaintiffs.

The only point made upon this appeal is that the complaint did not state a cause of action, and the only ground urged for its invalidity is that it appears from the complaint that appellant did not consent to the assignment of the contract to respondents. No issue was raised by the answer as to the validity of the assignment, but, on the contrary,

[1] Reported in 102 N. W. 1133.

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such assignment was conceded by the defense, and the counterclaim pleaded. These issues were submitted to the jury, and the decision of the lower court is not subject to review upon this appeal.

Order affirmed.

JOHN A. HUMBIRD and Others v. ALGER, SMITH & COMPANY and Others.[1]

January 27, 1905.

Nos. 13,192—(68).

Appeal by plaintiffs from a judgment of the district court for St. Louis county, entered pursuant to the findings and order of Cant, J. Affirmed.

H. Oldenburg, Billson & Congdon, and *J. B. Kerr,* for appellants.

White & Price, for respondent.

PER CURIAM.

This case is controlled by the decision of the Supreme Court of the United States in Humbird v. Avery, 195 U. S. 480, 25 Sup. Ct. 123. The questions involved are similar to those there presented and decided, and that decision is followed. The action involves a tract of land claimed by plaintiffs by purchase from the Northern Pacific Railway Company, which the company claimed belonged to it as a part of its land grant. Defendant Stevenson is the equitable owner, having acquired his rights by final proof under homestead entry; the final receipt having been issued to him. The land was never certified to the railway company as a part of its land grant, either as indemnity land or otherwise, and the patent to defendant Stevenson has not been issued. The title still remains in the general government, and the controversy between the parties as to their rights must be settled and determined by the Interior Department. Until the government parts with its ownership the courts have no jurisdiction to entertain actions involving controversies between individuals respecting the title. Sims v. Morrison, 92 Minn. 341, 100 N. W. 88.

[1] Reported in 102 N. W. 1138.

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The judgment appealed from is therefore affirmed, but this result will not affect either party as to facts subsequently arising. If either hereafter acquires the legal title from the general government, the decision in this case will not bar further action based thereon. Until the rights of Stevenson are vacated in some proceeding in the Interior Department, he is the equitable owner of the land, and the court below properly so adjudged.

Judgment affirmed.

HENRY W. LEE v. FRANK H. KRATKA.[1]

January 27, 1905.

Nos. 14,010—(28).

Appeal by defendant, contestee, from a judgment of the district court for Red Lake county, entered pursuant to the findings and order of Grindeland, J. Affirmed.

F. A. Grady and Perl W. Mabey, for appellant.

R. J. Montague and *Henry W. Lee,* for respondent.

PER CURIAM.

This is an appeal from a judgment in an election contest, for the office of mayor of the city of Thief River Falls. The common council canvassed the vote cast for mayor at the fall election of 1903, giving the contestee, Frank H. Kratka, a majority of four votes. In a contest duly instituted and hearing before the district court, in which there was a recount of the votes, upon findings of fact it was held that Ira C. Richardson received a majority of four votes, who in the court's conclusion of law was duly declared elected mayor.

The notice of contest is quite lengthy, and embraces statements to the effect that in each of the three wards of the city a specified number of votes were counted for Kratka which should have been counted for Richardson; but the names of such voters were not stated, and we are not inclined to think that this was necessary, particularly as no bill of particulars was asked by the contestee. But the parties seem to

[1] Reported in 102 N. W. 1134.

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have gone to trial with no other objection than that the notice was insufficient, upon which a dismissal was sought. For the purposes to which the findings of the trial court were directed we think the notice was sufficient, and so hold.

The findings of the trial court are not open to objection, for the reason that none of the exhibits, consisting of ballots to which objections were made and the poll lists which were received, are returned here. It is very clear that the conclusions of law are sustained by the trial court, and the judgment appealed from must be affirmed.

Judgment affirmed.

BOARD OF COUNTY COMMISSIONERS OF RAMSEY COUNTY v. OTTO H. AROSIN and Another.[1]

February 10, 1905.

Nos. 13,972—(10).

Appeals by plaintiff and defendants from an order of the district court for Ramsey county, Jaggard, J., denying a motion for a new trial, on condition plaintiff consent to reduce the amount for which judgment was ordered to $9,439.14. Affirmed.

T. R. Kane, County Attorney, and *O. H. O'Neill,* Assistant County Attorney, for appellants.

Harris Richardson, Edward P. Sanborn, and *Cobb & Wheelwright,* for respondent.

PER CURIAM.

This case presents similar questions to those involved in Board of Co. Commrs. of Ramsey County v. Elmund, supra, page 196; and, since the conclusions we are required to adopt must be ruled by that case, the order appealed from is affirmed.

Order affirmed.

[1] Reported in 102 N. W. 1133.

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BOARD OF COUNTY COMMISSIONERS OF RAMSEY COUNTY v. WILLIAM R. JOHNSON and Another.[1]

February 10, 1905.

Nos. 13,973—(11).

Appeal by defendants from an order of the district court for Ramsey county, Jaggard, J., denying a motion for a new trial. Affirmed.

Arthur J. Stobbart, Durment & Moore, and *W. J. Griffin,* for appellants.

T. R. Kane, County Attorney, and *O. H. O'Neill,* Assistant County Attorney, for respondent.

PER CURIAM.

This case presents similar questions to those involved in Board of Co. Commrs. of Ramsey County v. Sullivan, supra, page 201; and, since the conclusions we are required to adopt must be ruled by that case, the order appealed from is affirmed.

Order affirmed.

W. C. HOWE v. ANNE NELSON and Others.[2]

April 14, 1905.

Nos. 14,293—(109).[3]

Appeal by defendants from an order of the district court for Clay county, Baxter, J., denying a motion for a new trial. Affirmed.

G. Halvorson, for appellants.

C. A. Nye, for respondent.

[1] Reported in 102 N. W. 1133. [2] Reported in 103 N. W. 1132.
[3] April, 1905, term.

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PER CURIAM.

Action to determine adverse claims to real estate, consisting of a lot in the village of Winnipeg Junction. The answer admitted respondent's ownership, but alleged that appellants had acquired liens upon the premises by virtue of certain judgments which had taken effect while the same were unoccupied by respondent as his homestead, and no notice had been filed designating the premises as such, as required by statute.

The court found that during all of the time mentioned respondent occupied the property as his homestead; that appellants claimed liens upon the same, but that none of them were valid. Appellants were required to prove their alleged liens on the premises, unless admitted at the trial. The record does not disclose any proofs of the judgments, nor any admissions by respondent as to their existence. The reference at the trial to the issuance of an execution was too indefinite to be treated as an admission that an execution had issued upon a valid judgment. Respondent was entitled to judgment upon this ground, and it is not necessary to consider the other question as to whether he occupied the premises at the time alleged.

Order affirmed.

O. C. TRACE v. WENDELIN VOIGHT.[1]

April 28, 1905.

Nos. 14,225—(31).

From a judgment in favor of the defendant in the district court for Morrison county, entered pursuant to an order of Searle, J., in open court, plaintiff appealed. Affirmed.

E. A. Kling, for appellant.

J. N. True, for respondent.

PER CURIAM.

This action was brought by plaintiff in justice court to recover the value of certain professional services alleged to have been rendered by

[1] Reported in 103 N. W. 1134.

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him to defendant. Defendant had judgment before the justice, and from a judgment of the district court, affirming the same, plaintiff appealed to this court. An examination of the evidence discloses no ground on which a reversal of the judgment appealed from may be ordered.

The rule laid down in Croonquist v. Flatner, 41 Minn. 291, 43 N. W. 9, and followed in Larson v. Johnson, 83 Minn. 351, 86 N. W. 350, must be applied. It was held in those cases that, on appeals from justice court on questions of law alone, the only question necessary to be determined, where no rulings are complained of, is whether the evidence presented to the justice was such that from it he might have found facts which would justify his judgment. No rulings are complained of in this case, and the evidence is sufficient to justify the justice in finding that the employment of plaintiff as a consulting physician by Dr. Kerkhoff, who had been treating defendant's daughter in her illness, was unauthorized, and that defendant did not ratify his acts in so employing plaintiff. The evidence tends to show that Dr. Kerkhoff had, prior to the time he requested the services of plaintiff, been dismissed by defendant, and was not then his physician, nor authorized to act for him. It also tends to show that defendant was led to believe, at the time plaintiff was at his residence in consultation with Dr. Kerkhoff, that Kerkhoff had requested plaintiff to examine the patient for the sole purpose of confirming his own diagnosis of the case. If this evidence is true, it is conclusive against plaintiff's right of recovery, and whether it was true was for the justice to say.

Judgment affirmed.

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ROBERT M. STITT and Another v. RAT PORTAGE LUMBER COMPANY.[1]

May 12, 1905.

Nos. 14,237—(35).

Appeal by defendant from an order of the district court for St. Louis county, Dibell, J., granting a motion for a new trial, after a trial and a directed verdict in favor of defendant. Affirmed.

R. R. Briggs, for appellant.

H. B. Fryberger, for respondents.

PER CURIAM.

Action to recover for services for negotiating a certain contract between defendant and a third party, and other services. For answer defendant entered a general denial as to the merits, set up the pendency of a former action in abatement, pleaded a judgment in that action a bar, and also pleaded estoppel by judgment.

During the trial plaintiffs' attorney, for the purpose of proving a part of their case, offered in evidence the cross-examination of a witness examined on behalf of defendant, whose deposition had been taken by stipulation, but was ruled out as not proper cross-examination. After introducing some other evidence, and making several offers of evidence, plaintiffs made a motion for a continuance of the cause in order that they might secure such further evidence as the case might require, and also moved the court for a dismissal of the action in case the motion for continuance should be denied. The motion for continuance was resisted by defendant, and plaintiffs' attorney seems to have taken it for granted that the court denied both motions, and thereupon abandoned the case. While the record is not clear, it seems that plaintiffs assumed that both motions were denied and abandoned their case, and the court no doubt so ruled by proceeding with the trial. Defendant then introduced evidence in support of its answer, and moved the court to direct a verdict in its favor, which motion was granted.

Plaintiffs then moved for a new trial, specifying as the ground thereof irregularity in the proceedings of the court, irregularity in the order

[1] Reported in 103 N. W. 1133.

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of the court, abuse of discretion on the part of the court by which plaintiffs were prevented from having a fair trial, accident and surprise which ordinary prudence could not have guarded against, and error on the part of the court in refusing to dismiss the action when plaintiffs' attorney abandoned the case, and upon other grounds directed to the rulings of the court in the admission of evidence. The motion for a new trial was granted, the order not specifying upon what ground, and in a memorandum the court discusses somewhat the sufficiency of the evidence to support the defense of former adjudication.

Under the rule adopted by this court in a number of decisions, the memorandum will not be treated as a part of the order of the court, unless specifically referred to or made a part thereof. The order of the court should be sustained, if it can be justified upon any of the grounds mentioned in the motion for a new trial. The court may have become satisfied that the attorney for plaintiffs had unwittingly relied upon the cross-examination of defendant's witnesses to prove the main point in their case, and was taken by surprise when that deposition was ruled out. The circumstances were such that the court would have been justified in granting a continuance upon proper terms, or in dismissing the case, and, if those considerations influenced the court in ordering a new trial, it was within the limits of a reasonable discretion, in the interest of substantial justice.

Order affirmed.

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E. O. HALVORSON v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.[1]

May 12, 1905.

Nos. 14,303—(57).

Appeal by defendant from an order of the district court for Chippewa county, Qvale, J., denying a motion for judgment notwithstanding the verdict or for a new trial, after a trial and verdict in favor of plaintiff for $125. Affirmed.

F. W. Root and *C. A. Fosnes,* for appellant.

J. O. Haugland, for respondent.

PER CURIAM.

Action to recover damages for injuries to plaintiff's horse, alleged to have been caused by the negligence of defendant.

It appears from the record that as plaintiff's hired man was driving the horse on Main street, in Montevideo, over and across defendant's railroad track, the animal was caught in a telephone wire, which lay upon or near the ground, and was seriously injured. There is no direct evidence tending to show how the wire happened to be, or the length of time it had been, down. The case was submitted to the jury, and a verdict returned for plaintiff. Defendant appealed from an order denying a new trial.

The only question raised in this court is whether the evidence was sufficient to justify the jury in finding negligence on the part of defendant. A careful consideration of the record leads to the conclusion that the verdict should be sustained. While there is no direct evidence that defendant was guilty of negligence, a majority of the court are of opinion that the jury was justified in inferring negligence from the facts and circumstances shown on the trial.

Order affirmed.

[1] Reported in 103 N. W. 1132.

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STATE ex rel. J. B. KELTGEN v. WILLIAM McMAHON.[1]

May 12, 1905.

Nos. 14,388—(61).

Appeal by relator from an order of the district court for Renville county, Qvale, J., denying a motion for a new trial. Affirmed.

Parsons & Bowler, for appellant.

Frank Murray and *Thomas H. Quinn,* for respondent.

PER CURIAM.

In this case an information for a quo warranto was filed and a writ issued at the instance of the relator against the respondent for intruding into and usurping the office of president of the village council of the village of Bird Island. Issue was joined, and upon trial the court filed its findings of fact and conclusion of law. The information was thereby dismissed, and the writ of quo warranto quashed, and judgment ordered for respondent. This appeal was taken from an order denying relator's motion for a new trial.

Upon this appeal it appeared that the term of office in controversy had expired, so that the only question before this court concerned the correctness of the ruling of the trial court, in so far as the same affects the question of costs. The controversy turned upon the question whether respondent was an elector of the village of Bird Island at the annual election held in March, 1904. There was dispute in the testimony on this point. The trial court held that he was such an elector. It is the well-established rule and practice of this court that the findings of fact by a trial court will not be reversed, where there is evidence reasonably tending to sustain them. Dunnell, Minn. Pr. § 1654. In this case there was abundant evidence reasonably tending to sustain the findings of the trial court.

Order affirmed.

[1] Reported in 103 N. W. 1133.

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ACTION.

A vested right to existing defenses is under the protection of the law, save only as to those defenses which are based on informalities not affecting substantial rights and are not based on equity or justice.

—Merchants National Bank of St. Paul v. City of East Grand Forks, 246.

ADVERSE POSSESSION.

In order that adverse possession may ripen into title, there must be continuity of adverse possession for the full statutory period. Acknowledgment by the adverse claimant of the owner's title before the statute has run in his favor breaks the continuity, and the prior adverse possession cannot be tacked to any subsequent adverse possession. A contract with the owner to buy the land is sufficient acknowledgment to break the continuity. Such contracts were rightly admitted in evidence.

—Olson v. Burk, 456.

ANSWER.

See Pleading.

APPEAL AND ERROR.

Assignments of error not specifically urged in the brief will not be considered.

—Gallagher v. Northern Pacific Ry. Co., 64.

—Pitz v. Kentucky & Northern Distilling & Cattle Feeding Co., 519.

In appeal by plaintiff from judgment in favor of intervening claimant, neither the garnishee nor defendant in the municipal court are necessary parties to the appeal to the district court.

—Peterson v. Knuutila, 114.

The settled case proposed by one party and certified by trial judge to contain substantially all the material evidence cannot be attacked on appeal by ex parte affidavits.

—Haidt v. Swift & Co., 146.

This court will not revise findings of fact made by a trial court, to correct which no motion was made therein, where there is no bill of exceptions or settled case, nor a return purporting to contain all the proceedings and evidence. Nor will it consider whether such finding is sustained by the

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APPEAL AND ERROR—Continued.

evidence unless error is specifically assigned. On such a record the only question presented is whether the findings of fact sustain the conclusions of law.

—Bryant v. Nelson-Frey Co., 305.

Notice of appeal from judgment in justice court, which stated defendant appealed from the judgment and the whole thereof, and demanded a new trial in the district court, was void.

—Buie v. Great Northern Railway Co., 405.

Where by statute or rule of court a "case" or bill of exceptions may be proposed within a certain time after notice of filing of the decision of court, the time within which to propose such "case" or bill of exceptions does not begin to run until service of the notice. But where the parties stipulate fixing the time of settlement, service of the notice is waived and governed by the terms of the stipulation.

—State ex rel. v. Kelly, 407.

Under G. S. 1894, § 4991, justice of the peace has no power to certify a cause to the district court, until the title to real estate come in issue on the evidence. It is not sufficient that the pleadings show such issue. The improper certification of a cause ousts both courts of jurisdiction and the district court cannot remand the case to the justice for trial. The only order the district court can enter is to dismiss the case.

—Sorenson v. Torvestad, 410.

Assignments of error not argued in brief are waived.

—Olson v. Burk, 456.

An order sustaining a demurrer to a counterclaim entered before hearing of the cause, and not considered at such hearing, cannot be reviewed on appeal from an order denying a new trial.

—Grimes v. Ericson, 461.

By exceptions to instructions to jury that same are immaterial, counsel cannot raise questions which should be raised by objections to introduction of evidence.

—Minneapolis Threshing Machine Co. v. Burton, 467.

In an action for conversion of certain shares of its capital stock by defendant, where evidence of special damage was objected to as incompetent, irrelevant and immaterial, but there was no objection that the evidence was not admissible under the pleadings, the sufficiency of the allegations of the complaint as to such special damage cannot be raised for first time on appeal. Not reversible error to receive letters in evidence against objection that agent had no authority to receive and answer letters.

—Humphreys v. Minnesota Clay Co., 469.

Decision of trial judge respecting competency of witness to give expert evidence will not be reversed on appeal, where there is evidence fairly tending to show competency or incompetency.

—Meyers v. McAllister, 510.

Where complaint alleges assignment of contract to plaintiffs and answer

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APPEAL AND ERROR—Continued.
admits assignment, the decision of the trial court is not subject to review on appeal when only ground urged is that complaint does not state a cause of action because it appears from the complaint appellant did not consent to the assignment.
—Isakson v. Nelson, 522.
Where election contest is made on ground that specified ballots were improperly counted, the findings of the trial court cannot be reviewed on appeal where the exhibits, consisting of the objectionable ballots and poll lists, are not returned.
—Lee v. Kratka, 524.
On appeal from order denying a new trial in proceeding in nature of quo warranto to elective office, findings of fact will not be reversed where there is evidence reasonably tending to sustain them.
—State ex rel. v. McMahon, 532.

ASSAULT AND BATTERY.
Second verdict in favor of plaintiff in case where plaintiff and her husband testified that defendant pushed plaintiff against a large box, and defendant and her husband and six other witnesses denied testimony of plaintiff.
—McKenzie v. Banks, 496.

ASSESSMENT FOR LOCAL IMPROVEMENT.
Where defendant's charter provided that its deeds to purchasers at sales for unpaid local assessments should be prima facie evidence of title in purchaser after the time for redemption had expired, (the time for redemption being five years) and no sale should be declared invalid unless an action was brought within three years from the date of sale, but if the sale was held invalid the purchaser should have right to return of money paid, the purchaser's right to refundment does not depend on an action to test the validity of the sale being brought within three years. Otherwise in case of fraud or laches.
—Otis v. City of St. Paul, 57.
Judgments in local assessment proceedings are like judgments in ordinary tax proceedings, and cannot be attacked collaterally.
—Hause v. City of St. Paul, 115.

ASSIGNMENT.
The amount due upon a completeed contract for public work with the city of Duluth may be assigned, notwithstanding section 276 of the charter forbidding an assignment of the contract.
—Lowry v. City of Duluth, 95.
Evidence sufficient to show a valid assignment for money due from employer to assignor for his labor.
—Peterson v. Knuutila, 114.

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ATTORNEY AND CLIENT.

Without authority from his client an attorney who recovers a judgment cannot compromise it for less than its face value. If he does, the client may recover the sum received by the attorney and maintain his action for such damages as he has sustained by the unlawful settlement.

—Burgraf v. Byrnes, 418.

For his personal use or profit neither an administrator nor his attorney can purchase an outstanding life estate in property belonging to the estate. If he does the administrator must account to the estate.

—Turner v. Fryberger, 433.

Where attorney is employed to collect claims due the client, the general rules of law of principal and agent apply. In such case the attorney has no implied authority to extend the time of payment of claims in his hands for collection.

—Mason v. Edward Thompson Co., 472.

Where attorney of record enters into stipulation settling and dismissing action, under mistaken assumption that he has express authority of his client to do so, his client is not bound thereby, may repudiate the stipulation within a reasonable time and reinstate the cause.

—Schaefer v. Schoenborn, 496.

BAILMENT.

Where goods are left in storage warehouse agreed upon, are removed therefrom to another place by bailee without notice to bailor, and the goods are there destroyed by fire, the bailee is liable to the bailor for their market value. Intention of parties to store goods in certain place, a contract with reference to storage there, and delivery of the goods there to the bailee is an agreement to store at that place. A conventional warehouse receipt which omitted to specify the place of storage was not the contract, but the prior oral contract.

—McCurdy v. Wallblom Furniture & Carpet Co., 326.

Where defendant merchants gratuitously disbursed plaintiffs' money in cashing checks of their buyer of cattle and were notified by plaintiffs: "Don't pay any money out except for stock," they were not liable for money subsequently paid by them on checks which appeared to be for cash but in fact were for stock. Reversible error to direct verdict.

—Miller v. Dayton, 340.

BANKRUPTCY.

Upon adjudication of bankruptcy title to bankrupt's property passes from him at once and vests in court conditionally, pending the appointment of a trustee in bankruptcy. Where it appeared claim sued on had not been scheduled, that no trustee had been appointed, and that bankrupt had been discharged, it not appearing whether court had exercised jurisdiction over the estate or the estate had been abandoned by the creditors, such facts do not operate to revest title in former bankrupt.

—Rand v. Sage, 344.

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BANKRUPTCY—Continued.

In action to recover value of services rendered by plaintiff prior to his bankruptcy, the schedules of property filed by him in the bankruptcy proceedings were properly admitted in evidence, as part of his cross-examination for purpose of showing his credibility as a witness.
—Rand v. Sage, 344.

Indictment against banker for receiving deposits in his bank when insolvent is not illegal, because grand jury which returned it examined his trustee in bankruptcy and his books of account.
—State v. Strait, 384.

A full discharge of individual liability of one partner on a firm debt may be had in bankruptcy proceedings concerning that individual partner. Rule applied in action by assignee of judgment creditor against two partners to renew the judgment. A claim is listed where the bankrupt's schedule of debts contains the name of original creditor, the nature and amount of the debt.
—Loomis v. Wallblom, 392.

Action by trustee in bankruptcy of private bankers against defendant bank to recover amount on deposit belonging to them and defense of application of amount on deposit as payment of past due promissory note of one insolvent and another. Such application of credit with bank not an unlawful preference within meaning of bankruptcy act of 1898.
—Habegger v. First National Bank of St. Paul, 445.

Section 67, subd. f, of bankruptcy act of 1898, providing that all attachments or other liens against bankrupt within four months prior to filing petition in bankruptcy against him shall become void if he is adjudged a bankrupt, applies both to voluntary and involuntary proceedings against the debtor.
—Cavanaugh v. Fenley, 505.

BANKS AND BANKING.

Application by bank of amount of insolvent's deposit with it as payment of past due promissory note of insolvent not an unlawful preference within meaning of bankruptcy act of 1898.
—Habegger v. First National Bank of St. Paul, 445.

BASTARD.

Proceedings under bastardy act prosecuted by the mother are for her benefit as well as the protection of the public. In such proceedings the court may grant an allowance to be paid the mother for the support of the child. G. S. 1894, § 2053, does not authorize the county commissioners in such case to release mother's interest without her consent.
—State ex rel. v. Hausewedell, 177.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

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BILLS AND NOTES.

In action on promissory note which defendant admitted he had executed but denied he had delivered to indorsee, and the issue was whether plaintiff was a bona fide holder, the evidence made a case for the jury.
—Mendenhall v. Ulrich, 100.

It is no defense to an action on a promissory note that it was made solely for the accommodation of a third person for no valid consideration passing to the maker, even when the holder has notice of these facts at the time of delivery, if he has taken it in the regular course of business for value before its maturity.
—First National Bank of St. Cloud v. Lang, 261.

Application by bank of amount of insolvent's deposit with it as payment of past due promissory note of insolvent not an unlawful preference within meaning of bankruptcy act of 1898.
—Habegger v. First National Bank of St. Paul, 445.

BOND.

Provisions of 1900 charter of City of St. Paul relating to bond given for performance of contract with city supersede provisions of general law (Laws 1897, p. 568, c. 307, § 3) requiring notice to principal and sureties on bond within ninety days after last item of work or material.
—Grant v. Berrisford, 45.

A bond, in the hands of a bona fide holder, issued by a township under statute prescribing a public record as determinative of the amount of authorized issue, which on its face exceeds the limit of the entire issue proper under such record produced, is void as to such excess notwithstanding recitals therein of compliance with all legal requirements and payment of interest thereon.
—Corbet v. Town of Rocksbury, 397.

BROKER.

Contract between owner of land and agent for sale of separate tracts of land not void, because agent was not bound by its terms to do anything. There was sufficient consideration for the contract when the acceptance of the offer reduced the agent's claims for prior commissions. Such contract was severable.
—Stauff v. Bingenheimer, 309.

In action to recover broker's commission for making certain sales of land where evidence made plaintiff's diligence in notifying defendant of objections to the title a question of fact, court erred in directing verdict for defendant.
—Stauff v. Bingenheimer, 309.

CARRIER.

Where bill of lading issued by initial carrier for goods to be transported over connecting lines of railroad contains no agreement on subject of

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CARRIER—Continued.

route, and there are several routes, the right to designate one rests with the carrier and becomes part of contract. But the contract may be changed in this respect by subsequent parol agreement between the shipper and the carrier. Violation of such contract entitles injured shipper to damages.

—Steidl v. Minneapolis & St. Louis Railroad Co., 233.

Where woman passenger was thrown from railway train when about to alight at a station the question of her contributory negligence was for the jury. Where she suffered at time of trial from curvature of spine and a floating kidney verdict of two thousand dollars was not excessive, if these troubles were occasioned by her fall. Plaintiff entitled to recover damages for all of direct consequences of her injuries—future as well as past—but only for such future consequences as were shown, to a reasonable certainty, would result from her injuries. Charge to jury was not error because not a correct statement of reciprocal duties of carrier and passenger. Neither was an instruction that it was not negligence to alight at the rear door of the car.

—Olson v. Chicago, Milwaukee & St. Paul Railway Co., 241.

Common carrier's duty is to forward promptly goods delivered to him. If he negligently delays the shipment so that while in transit the goods are damaged by an act of God which would not have harmed them except for the delay, the carrier is liable even when the act of God could not have been foreseen. The negligent delay is such a proximate cause as to render carrier liable, whether goods are perishable or otherwise. These rules applied in action for loss of car of broom corn in flood at Kansas City where defendant failed to notify connecting carrier of arrival of car.

—Bibb Broom Corn Co. v. Atchison, Topeka & Santa Fe Railway Co., 269.

CASES DISTINGUISHED.

American Refrigerator Transit Co. v. Hall, 174 U. S. 70.

—State v. Union Tank Line Co., 326.

Bailey v. Austrian, 19 Minn. 465 (535).

—Stauff v. Bingenheimer, 313.

Beique v. Hosmer, 169 Mass., 541.

—Merrill v. Pike, 188.

Berryhill v. Smith, 59 Minn., 285.

—Minnesota Debenture Co. v. Johnson, 153, 154.

Blum v. State, 94 Md., 375.

—State v. Strait, 389.

Bradley v. Cunningham, 61 Conn. 485.

—McCurdy v. Wallblom Furniture & Carpet Co., 330.

Daniels v. Newton, 114 Mass. 530.

—Stearns v. Kennedy, 442.

Ellsworth v. Southern Minn. Ry. Ex. Co., 31 Minn. 543.

—Stauff v. Bingenheimer, 313.

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CASES DISTINGUISHED—Continued.

Fogle v. Schaeffer, 23 Minn. 304.
—Pope v. Waugh, 502.

Foster v. Landon, 71 Minn. 494.
—Hanna v. Duxbury, 8.

Hall v. Sauntry, 72 Minn. 420.
—Minnesota Debenture Co. v. Johnson, 153, 154.

Hamilton v. McIndoo, 81 Minn. 324.
—Pope v. Waugh, 504.

Hawkins v. Horton, 91 Minn. 285.
—Hause v. City of St. Paul, 115.

Henningsen v. City of Stillwater, 81 Minn. 215.
—Otis v. City of St. Paul, 62.

Holloran v. Union, 133 Mo. 470.
—Merrill v. Pike, 188.

Jones v. Morrison, 31 Minn. 140.
—Hanna v. Duxbury, 8.

King v. Remington, 36 Minn. 15.
—Rand v. Sage, 350.

McCord v. Knowlton, 79 Minn. 299.
—Hunt v. Ahnemann, 71.

Tarbox v. Gotzian, 20 Minn. 122 (139).
—Stauff v. Bingenheimer, 313.

CASES OVERRULED.

Schmid v. County of Brown, 44 Minn. 67.
—Justus v. Board of County Commissioners of Ramsey County, 73.

COMPROMISE AND SETTLEMENT.

Wording of receipt of amount specified therein construed as full settlement and dismissal of action and all claims of plaintiff against defendant arising out of contract for publication of specified book.
—Kelly v. Pioneer Press Co., 448.

CONSTITUTION.

Laws 1899, p. 246, c. 225, does not violate Amend. 14, Const. (U. S.) nor Const. art. 1, §§ 2, 7, and is not an interference with interstate commerce.
—State v. Edwards, 225.

Laws 1903, p. 690, c. 382, relating to assessments for public improvements in certain cities, not obnoxious to Const, art. 4, § 27. Title of act sufficient if fairly suggestive.
—Merchants National Bank of St. Paul v. City of East Grand Forks, 246.

Art. 4, § 36—Municipal charter.
—Grant v. Berrisford, 47.

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CONTRACT.

After completion of a contract with the city of Duluth for public work the amount due from the city may be assigned, notwithstanding section 276 of the charter forbidding an assignment of the contract.

—Lowry v. City of Duluth, 95.

Promise of defendant to aid real estate agent in making sale of specified land to given purchaser is good consideration for agent's promise to pay defendant a specified part of the agent's commission.

—Barnett v. Block, 138.

Contract to furnish specified heating plant for building, without express warranty of its capacity, carries no implied warranty that plant is sufficient to heat the building. Where boiler of specified size could not be obtained and contractor furnished boiler of greater heating capacity than the one designated in contract, there was a substantial compliance with the contract.

—Holt v. Sims, 157.

Contract to "cut and remove" timber within specified dates construed to pass title to logger as to logs cut before, but not removed until after, expiration of term. Otherwise as to title of logs cut after expiration of term.

—Alexander v. Bauer, 174.

Where bill of lading issued by initial carrier for goods to be transported over connecting lines of railroad contains no agreement on subject of route, and there are several routes, the right to designate one rests with the carrier and becomes part of contract. But the contract may be changed in this respect by subsequent parol agreement between the shipper and the carrier. Violation of such contract entitles injured shipper to damages.

—Steidl v. Minneapolis & St Louis Railroad Co., 233.

Where contract between divorced husband and wife, made to facilitate their divorce, is valid on its face but void as against public policy, court will enjoin divorced wife from prosecuting an action brought by her in violation of her agreement.

—McAllen v. Hodge, 237.

A contract is severable where the part of it to be performed by one party consists of separate and independent items, and the consideration therefor is apportioned to each item. Applied to case of contract between owner and agent for sale of separate tracts of land. Contract in question not void because agent was not bound by its terms to do anything. There was sufficient consideration for the contract when the acceptance of the offer reduced the agent's claims for prior commissions.

—Stauff v. Bingenheimer, 309.

A party who has been induced to enter into a contract by the false representations of another may affirm the contract and sue for the damages sustained, or sue in equity for a rescission of the contract by the court,

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CONTRACT—Continued.

or rescind by his own act and sue for what he parted with by reason of the fraud. When he seeks to rescind by his own act, he must restore or offer to restore to the other party whatever of value he received from him by virtue of the contract. In such case it is sufficient for the defrauded party to make a fair offer to return what he received, and demand what he parted with; and, if his offer and demand be refused, a strict and technical tender is not essential, but it is sufficient if proof of such offer and demand be made on the trial, with restoration in such practicable way as the court may direct. Rule applied, and evidence *held* sufficient to sustain a finding of the jury to the effect that the alleged representations were made and relied upon; that the plaintiff offered to restore to the defendant what it had received by the contract, and to place the defendant in statu quo; and, further, that the plaintiff did not affirm the contract, but rescinded it. The instructions to jury concerning alleged conspiracy of officers of company and another to make false representations to the purchaser were not reversible error.

—I. L. Corse & Co. v. Minnesota Grain Co., 331.

Evidence concerning employment of plaintiff by defendant indicated contract with defendant as trustee and not with defendant as an individual.

—Rand v. Sage, 344.

In charging jury trial court rightly refused to give instruction emphasizing certain conceded facts on which plaintiff relied to overcome assertions of defendant concerning terms of contract of employment.

—Atwood Lumber Co. v. Watkins, 464.

Party to contract who is in default in performing his part of it has no right, as matter of law, to rescind contract for failure or refusal of other party to perform. Action in Minnesota court by foreign corporation on contract made in another state is not prohibited by Laws 1899, p. 68, c. 69.

—Mason v. Edward Thompson Co., 472.

CONTRIBUTORY NEGLIGENCE.

See Negligence.

CORPORATION.

Complaint in action by minority stockholder which alleged conspiracy between majority stockholders and corporation to prevent dividends, and prayed for an accounting and that corporation be compelled to declare dividend of its earnings, *held* sufficient against demurrers.

—Anderson v. W. J. Dyer & Bro., 30.

The refusal of defendant corporation to transfer the stock of plaintiff on its books and its assertion of the right to cancel the stock was a conversion of it.

—Humphreys v. Minnesota Clay Co., 469.

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CORPORATION—Continued.
Action in Minnesota court by foreign corporation on contract made in another state is not prohibited by Laws 1899, p. 68, c. 69.
—Mason v. Edward Thompson Co., 472.

COUNTERCLAIM.
See Pleading, 135.

COUNTY AND COUNTY OFFICERS.
Sheriff is not entitled to fee of one dollar from his county for each execution issued upon a personal property tax judgment which he returns unsatisfied. G. S. 1894, §§ 1570, 1574, and not sections 5550, 5553, govern.
—Justus v. Board of County Commissioners of Ramsey County, 72.
Where county treasurer in good faith delivered to deputy county auditor checks for amounts of, and payable to persons named in, redemption and refundment orders forged by deputy on customary blanks used by auditor, neither the treasurer nor the sureties on his official bond are liable to the county for such amounts.
—Board of County Commissioners of Ramsey County v. Elmund, 196.
Person who receives proper appointment under G. S. 1894, § 715, as deputy county auditor during auditor's first term and continues to serve as deputy during auditor's second term without new appointment is deputy de facto and, so far as public is concerned, authorized to perform duties of deputy.
—Board of County Commissioners of Ramsey County v. Sullivan, 201.
County auditor and sureties on his official bond *held* liable for acts of his deputy in forging and presenting redemption and refundment orders on county treasurer, whether deputy were de facto or de jure officer, and irrespective of negligence of county treasurer.
—Board of County Commissioners of Ramsey County v. Sullivan, 201.

COURTS (DISTRICT).
Under G. S. 1894, § 4991, a justice of the peace has no power to certify a cause to the district court, until the title to real estate comes in issue on the evidence. It is not sufficient that the pleadings show such issue. The improper certification of a cause ousts both courts of jurisdiction, and the district court cannot remand the case to the justice for trial. The only order the district court can enter is to dismiss the case.
—Sorenson v. Torvestad, 410.

CRIMINAL LAW.
Indictment for grand larceny in second degree, charging theft from a building in the daytime of property belonging to corporation named, which fully describes building, need not give the name of owner of building. Rulings as to exclusion of evidence because calling for conclusion of witness or because of form of question not erroneous.
—State v. Minck, 50.

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CRIMINAL LAW—Continued.

It is a violation of Laws 1899, p. 246, c. 225, which requires a commission merchant licensed to sell grain on commission to render a true statement of details of the sale to the consignor within twenty-four hours of the sale, for a factor to report to his shipper a fictitious sale at highest quotation for the day, when the next day he sells the same grain at a higher price to a third person. Statement in complaint that defendant wilfully made false report is immaterial. Question of intent or good faith of consignee is immaterial. The law applies to all shipments whether from Minnesota or other states.

—State v. Edwards, 225.

Single act of sexual intercourse between a man and an unmarried woman does not constitute the crime of fornication within the meaning of G. S. 1894, § 6557. "Cohabit" as used in that statute means to live and dwell together.

—State v. Williams, 319.

Motion to set aside indictment against insolvent banker for receiving deposits when his bank was insolvent was properly overruled, the ground of motion being that the examination of his trustee in bankruptcy and his books of account by the grand jury which returned the indictment was a violation of defendant's constitutional rights. Grand jury not illegal because places of jurymen excused for being depositors in bank were filled by special venire.

—State v. Strait, 384.

CROSS-EXAMINATION.

How far a witness may be cross-examined as to matters irrelevant to the issue, for the purpose of affecting his credibility, rests largely with the discretion of the trial court. Improper to attempt to discredit a witness by innuendo instead of competent evidence.

—Malone v. Stephenson, 222.

DEED.

To obtain reformation of written instrument because of mistake of parties, or mistake of one and fraud of other party, mere preponderance of evidence is insufficient. The evidence must be neither contradictory, nor equivocal nor doubtful.

—Fritz v. Fritz, 264.

DIVORCE.

Where it appeared divorced wife brought action for alienation of affections of former husband and he intervened, setting up a contract to facilitate divorce between him and his wife whereby in consideration of $10,000 she released all claims against all persons for alienation of husband's affections, the court granted an injunction against further prosecution of the action.

—McAllen v. Hodge, 237.

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DIVORCE—Continued.

Judgment by default in divorce proceedings is protected against collateral attack by same conclusive presumption of validity as any other judgment. Upon such attack return of service of summons and complaint in default proceeding will be construed sufficient, if language can be thus construed fairly. Rule applied in case where action was against Robert J. Nelson and return showed service on John S. Bradley, who sometimes passed as Robert J. Nelson, that sheriff personally knew the defendant and knew him to be the person named as defendant; that his true name was not Robert J. Nelson but John S. Bradley, and that the name of Robert J. Nelson was an alias.
—Sodini v. Sodini, 301.

Where original complaint sought an absolute divorce because of adultery, and original answer sought divorce for same cause, and amended complaint sought to annul the marriage because of defendant's former marriage not legally dissolved, and amended answer alleged a valid divorce of defendant from the first marriage and prayed for alimony and suit money, court properly decided rights of respective parties could be determined in one action and defendant could be granted temporary alimony.
—Sodini v. Sodini, 301.

DULUTH (CITY OF).

Assignment of amount due upon a completed contract may be valid, notwithstanding section 276 of the charter forbidding an assignment of the contract. Such assignee may make the affidavit that all claims for labor have been paid.
—Lowry v. City of Duluth, 95.

EJECTMENT.

In action by holder of executory contract from railway company to recover possession of land the rental value of the land from date of contract was properly included in the verdict where the contract indicated parties intended purchaser should have possession.
—Ferguson v. Trovaten, 209.

EQUITY.

Under G. S. 1866, c. 66, § 199 (G. S. 1894, § 5361) the whole issue in equitable actions may be submitted to a jury, and if the verdict is sufficient the court may decide, upon the facts so found and the pleadings, which party is entitled to a judgment, without examining the evidence.
—Hunt v. Ahnemann, 67.

Rule that equity has jurisdiction to prevent multiplicity of suits applied where each of several insurance companies issued its policy of fire in-

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EQUITY—Continued.

surance in Minnesota standard form, and after partial loss the insured brought one action in which all the insurers were joined as defendants.
—Fegelson v. Niagara Fire Insurance Co. 486.

ESTOPPEL.

The substance of estoppel is the inducement to another to act to his prejudice. The substance of ratification is confirmation after conduct.
—Steffens v. Nelson, 365.

Bad faith is not always necessary to estoppel. Merely because his interest may change, a person may not take a position inconsistent with one previously assumed by him to the prejudice of a third person.
—Tozer v. Ocean Accident & Guarantee Corporation, 478.

EVIDENCE.

Where plaintiff purchased a mortgage and received the mortgage without written assignment and a copy of the mortgage note, which appeared to be and plaintiff believed to be the original note, upon which was an indorsement of assignment of the note and mortgage signed by the mortgagee, in an action to foreclose the mortgage where it appears the original note is unaccounted for, the burden is not on the plaintiff to account for its absence.
—Bloomer v. Burke, 15.

In an action for conversion of carload of grain shipped in name of plaintiff and received by defendant, where plaintiff alleged he was owner and defendant denied plaintiff was owner and alleged grain was shipped in plaintiff's name to keep the same from creditors of warehouseman, it was not error to charge the jury that the burden of proof of fraud was on defendant who alleged it.
—Holden v. Maxfield, 27.

Rule that parol evidence is admissible to show that written contract given by maker to person in whose favor it was drawn was not intended to be operative, except upon the happening of some future event, applied to promissory note given for premium upon insurance policy to be written on life of maker which maker had option to reject.
—Mendenhall v. Ulrich, 100.

In action on promissory note where maker has given evidence that note was put in circulation by fraud, the burden shifts to plaintiff to show that he was a bona fide holder without notice of the fraud.
—Mendenhall v. Ulrich, 100.

Where charge of negligence in operation of street car was not in running car at unlawful rate of speed but in running it in a negligent manner, it was not error to refuse to receive in evidence an ordinance of the city permitting cars to run twenty miles an hour on the street in question. It was not error to permit witness to testify to speed of car where no proper objection was made.
—Cameron v. Duluth-Superior Traction Co., 104.

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EVIDENCE—Continued.

In action of ejectment where plaintiff introduced, among other evidence to support allegations of complaint that it was owner of land in controversy, a judgment in an action to determine adverse claims in favor of plaintiff against holder of paper title and defendant offered to prove he was in actual possession of the land at the time action was begun in which judgment was rendered and remained continuously in possession thereafter, it was error to refuse the testimony unless defendant would disclose the nature of his title. Burden of proof of title is on the plaintiff.

—Minnesota Debenture Co. v. Johnson, 150.

In action upon contract for furnishing heating plant, where in the answer there was no allegation of fraud, evidence of statements during negotiation of contract which tended to show defendants had been deceived was properly excluded.

—Holt v. Sims, 157.

Where letters from customers concerning his goods were obtained by the manufacturer after beginning of action for purposes of the trial and to obviate taking the depositions of the writers, the admission of the letters in evidence was error, but not reversible error in trial before court without jury where there was sufficient evidence to support the findings of fact, and there was no ground to infer that the incompetent evidence was material factor in court's decision.

—Mankato Mills Co. v. Willard, 160.

In action by holder of executory contract to recover possession of land from persons who claimed title under a contract from same vendor, where answer alleged a contract of sale and purchase and part performance, without stating whether contract was oral or written, and alleged such performance as would take an oral agreement out of the statute, to exclude an offer of defendant to prove that railroad land commissioner offered to sell him the land for certain sum; that a written application was then prepared and signed by defendant; that the application was approved by the land commissioner; that defendant paid the purchase price, entered upon the land and in reliance on the contract made valuable improvements thereon;—on the ground that the negotiations prior to the written application were inadmissible to contradict or vary the writing, was error.

—Ferguson v. Trovaten, 209.

In proceedings to register title to real estate the burden of proof is upon the party asserting a mechanic's lien to prove that at the time of the trial in such proceedings the lien is valid and subsisting.

—Reed v. Siddall, 216.

Trial court erred in overruling objections to certain questions irrelevant to the issue respecting his habits, his relations to his wife and his neighbor's wife, asked of the defendant on cross-examination for purpose of affecting his credibility.

—Malone v. Stephenson, 222.

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EVIDENCE—Continued.

In action of trespass for destruction of fence which plaintiff claimed to be upon boundary line between land of plaintiff and defendant, it was not error to receive evidence that fence was not on line fixed by government survey but on defendant's land.

—Kelly v. Daley, 253.

To obtain reformation of written instrument because of mistake of parties, or mistake of one and fraud of other party, mere preponderance of evidence is insufficient. The evidence must be neither contradictory, nor equivocal nor doubtful.

—Fritz v. Fritz, 264.

In an action to recover broker's commission on sale of land pursuant to contract in writing, evidence that plaintiff had been acting as defendant's selling agent, had procured purchasers for several parcels and on each claimed commission, and contract was made as compromise of plaintiff's claim, is admissible to show consideration for the contract, and is not inconsistent with its terms.

—Stauff v. Bingenheimer, 309.

Where adjudication as bankrupt is shown, the presumption arises that whole estate is subjected to dominion of court for benefit of creditors of bankrupt. The burden of showing either that estate has been closed, or creditors had abandoned it, is then upon the bankrupt.

—Rand v. Sage, 344.

In action to recover value of services rendered by plaintiff prior to his bankruptcy, the schedules of property filed by him in the bankruptcy proceedings were properly admitted in evidence, as part of his cross-examination, for purpose of showing his credibility as a witness.

—Rand v. Sage, 344.

In action to recover amount of certain interest coupons the assessment roll of defendant town was properly received in evidence to show its assessed valuation, although the name of the town was incorrectly stated or misstated, there were interlineations to make it conform to action of boards of equalization, the jurat signed by the assessor was not signed or sealed by the county auditor—when the lands within its limits are correctly described by government subdivisions so as to render its territory susceptible of easy ascertainment.

—Corbet v. Town of Rocksbury, 397.

Where a will is sought to be avoided on the ground of undue influence, evidence which reasonably tends to show a mental condition rendering the testator susceptible to such influence should be received. In such action the burden of proving that will was not obtained by fraud or undue influence is not on child merely by reason of his relationship, but in connection with other circumstances this fact may make a prima facie case which may shift the burden of proof upon him.

—Fischer v. Sperl, 421.

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EVIDENCE—Continued.

In action of ejectment against person claiming title by adverse possession contracts between defendant and owners of the land for its purchase were rightly admitted in evidence for purpose of showing his acknowledgment of owners' title.

—Olson v. Burk, 456.

In action on protested check where answer alleged there was no consideration "or, if any, said consideration has wholly failed," the allegation that consideation had failed was insufficient to admit evidence that plaintiff had failed to perform certain promises he had made subsequent to delivery of check.

—Grimes v. Ericson, 461.

Where an article has no market value what it is sold for is relevant to prove its value.

—Humphreys v. Minnesota Clay Co., 469.

Where witness was asked in action for assault and battery whether he was in such position that he would have seen defendant touch plaintiff if she had done so, an objection to the question on ground that it called for conclusion of witness was properly sustained.

—McKenzie v. Banks, 496.

An offer to prove seller's lien on goods which he had delivered to buyer was properly excluded where there was no offer to prove an agreement that seller's lien should continue notwithstanding the delivery.

—Meyers v. McAllister, 510.

Not reversible error to receive in evidence long list of chattels shown to be correct by evidence of person who made it, without formal proof he could not testify to details independently of the list.

—Meyers v. McAllister, 510.

Competency of witness to give expert evidence is preliminary question for trial judge, whose decision will not be reversed on appeal where there is evidence fairly tending to show competency or where witness is held to be incompetent.

—Meyers v. McAllister, 510.

EXCEPTIONS (BILL OF).

Where by statute or rule of court a "case" or bill of exceptions may be proposed within a certain time after notice of filing of the decision of court, the time within which to propose such "case" or bill of exceptions does not begin to run until service of the notice. But where the parties stipulate fixing the time of settlement, service of the notice is waived and governed by the terms of the stipulation.

—State ex rel. v. Kelly, 407.

EXECUTOR AND ADMINISTRATOR.

For his personal use or profit neither an administrator nor his attorney

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EXECUTOR AND ADMINISTRATOR—Continued.

can purchase an outstanding life estate in property belonging to the estate. If he does the administrator must account to the estate.

—Turner v. Fryberger, 433.

Failure of foreign administrator to file a copy of his letters of administration in probate court of county before beginning of action affects merely his capacity to sue and is waived, unless objection is taken by answer as provided by G. S. 1894, § 5235. Fogel v. Schaeffer, 23 Minn. 304, distinguished.

—Pope v. Waugh, 502.

FACTOR.

It is a violation of Laws 1899, p. 246, c. 225, which requires a commission merchant licensed to sell grain on commission to render a true statement of details of the sale to the consignor within twenty-four hours of the sale, for a factor to report to his shipper a fictitious sale at highest quotation for the day, when the next day he sells the same grain at a higher price to a third person. Consignor not estopped from repudiating such sale until he is informed of all the facts. Statement in complaint that defendant wilfully made false report is immaterial. Question of intent or good faith of consignee is immaterial. The law applies to all shipments whether from Minnesota or other states.

—State v. Edwards, 225.

FORNICATION.

Single act of sexual intercourse between a man and an unmarried woman does not constitute the crime of fornication within the meaning of G. S. 1894, § 6557. "Cohabit" as used in that statute means to live and dwell together.

—State v. Williams, 319.

FRAUD.

In action upon contract for furnishing heating plant, the answer must allege fraud in leading purchaser to believe heating capacity of plant was greater than in reality, to allow defendant to introduce in evidence assertions of plaintiff made during the negotiations.

—Holt v. Sims, 157.

An action to cancel a contract for the sale of land on the ground of fraud, and for the recovery of the purchase price paid by the vendee before the discovery of the fraud, in which it does not appear that the vendors had title to the land, and in which no relief as to any real-estate record is involved, is a transitory, not a local, action.

—State ex rel. v. District Court of Pine County, 370.

A vendee in possession under contract for sale of real estate after payment of part of purchase price, who has been induced to enter into contract by fraudulent representations of vendor as to quantity of land, on dis-

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FRAUD—Continued.
covering the fraud may elect to keep his purchase and sue for damages sustained, even when not entitled to a deed and before full payment of purchase price. False representations as to quantity of land are not mere matters of opinion but are material. Failure of vendee to ascertain their falsity by survey or reference to official records does not release vendor.
—Stearns v. Kennedy, 439.
Where a release and dismissal of action for recovery of money and of all claims arising out of certain contract is sought to be avoided upon ground of fraud, a failure to show intentional misrepresentations is fatal to the party claiming fraud.
—Kelly v. Pioneer Press Co., 448.

FRAUDULENT CONVEYANCE.
Where father in good faith conveyed real estate to his adult son in consideration of receipt during his life of one half of crops grown thereon, and in consideration of payment of certain sums of money to his other children upon his death, the contract of sale being made two years before and the deed after the insolvency of a corporation in which he was stockholder, the receiver of the bank was not entitled to have the conveyance set aside as a fraud on creditors of grantor.
—Hunt v. Ahnemann, 67.

FRAUDS (STATUTE OF).
Under Statute of Frauds a written offer to buy or sell real estate must be accepted in writing, but the offer and acceptance need not be in same writing.
—Ferguson v. Trovaten, 209.

GAMING.
As against a demurrer, the complaint in an action to recover money lost in playing games of chance stated a good cause of action; there was no defect of parties, nor an improper joinder of several causes of action.
—Parsons v. Wilson, 416.

GARNISHMENT.
Garnishment of funds of insolvent within four months of time he is adjudged bankrupt is dissolved by bankruptcy proceedings, even when insolvent in his schedule of assets omitted reference to garnishment of debt. Judgment entered against person previously adjudged bankrupt, but before his final discharge, upon a provable claim existing at time of adjudication, from payment of which he is relieved by his discharge, is annulled by such discharge, and bankrupt has absolute right, after obtaining his discharge, to have execution upon the same perpetually stayed, if he acts with reasonable diligence.
—Cavanaugh v. Fenley, 505.

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GIFT.

Evidence tending to show an accepted gift of land from father to son sufficient to support verdict.

—Schmitt v. Schmitt, 414.

Courts of equity set aside gifts to donee who stands in confidential or fiduciary relation to donor, whether gift be made inter vivos or by will. The question of undue influence is one of fact for jury. Except in clear case court is not justified in directing judgment notwithstanding verdict that will in favor of testator's child was obtained by undue influence. Where suspicious circumstances make case doubtful a new trial should be granted. That remedy has not been changed by Laws 1895, p. 729, c. 320.

—Fischer v. Sperl, 421.

GRAND JURY.

Examination of trustee in bankruptcy of insolvent banker and of insolvent's books of account by grand jury is not illegal. Nor is grand jury illegally constituted because places of jurymen excused for being depositors in insolvent bank are filled by special venire.

—State v. Strait, 384.

HABEAS CORPUS.

Writ to obtain discharge of prisoner held under judgment in bastardy proceedings.

—State ex rel. v. Hausewedell, 177.

Writ obtained by person convicted of having unlawfully operated a steam boiler without first obtaining a license from the state boiler inspector.

—State ex rel. v. Justus, 207.

HIGHWAY.

Private person cannot maintain action for obstruction of public highway unless he is thereby specially injured more than citizens generally.

—Guilford v. Minneapolis & St. Louis Railroad Co., 108.

In action for trespass in which the defense was that the locus in quo was a highway, evidence did not justify a finding that the place was not a public highway. In deciding whether there was a dedication the character, situation and value of the land and the manner and extent of public travel across it, must be considered.

—Jeppson v. Almquist, 403.

HOLIDAY.

A justice of the peace was justified in holding necessity existed under G. S. 1894, § 7987, for trying case on legal holiday where on return day of summons parties had stipulated for adjournment to May 30, and defendant lived more than ninety miles distant.

—Fureseth v. Great Northern Railway Co., 500.

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HOMESTEAD.

The assignee of a soldier's additional homestead certificate acquires an equitable title to the specific land for which his certificate is properly filed. When the government patent issues to him, his legal title relates back to the date of his application. Such equitable interest may be conveyed by quitclaim deed and the legal title will then inure to the grantee. After the issue of the patent such grantee may maintain action for damages for trespass upon the land committed between the date of the application and the date of the patent.

—Gilbert v. McDonald, 289.

HUSBAND AND WIFE.

If a husband ratify the act of his wife in signing a receipt in his name without authority, the ratification extends to the natural use of that receipt, including its production to the debtor as evidence of payment, although the check given in exchange for the receipt, indorsed by the principal after such use of the receipt, is not paid.

—Steffens v. Nelson, 365.

INDEMNITY.

Written contract to indemnify plaintiff against loss sustained in manufacture of certain hosiery patented by defendant, by which latter was to receive a royalty based on margin of profit and to assume loss in disposing of manufactured goods, construed not to limit his liability to amount of royalty received.

—Mankato Mills Co. v. Willard, 160.

INDICTMENT AND INFORMATION.

Indictment for grand larceny, charging theft from a building in the daytime of certain property belonging to corporation named, which fully describes the building, is not defective because the name of owner of building is omitted.

—State v. Minck, 50.

Motion to set aside indictment against insolvent banker for receiving deposits when his bank was insolvent was properly overruled, the ground of motion being that the examination of his trustee in bankruptcy and his books of account by the grand jury which returned the indictment was a violation of defendant's constitutional rights. Grand jury not illegal because places of jurymen excused for being depositors in bank were filled by special venire.

—State v. Strait, 384.

INJUNCTION.

Rule that, where it appears in an action for injunction there is a change of circumstances after suit is begun which renders action unnecessary, an injunction will not be granted— *held* inapplicable in case where the

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INJUNCTION—Continued.

original complaint was merely to restrain paving of portion of street in front of plaintiff's property, but supplemental complaint brought in the city and its officers as defendants and prayed that paving contract be declared invalid and the city be restrained from making any citizens liable for the expense.

—Patterson v. Barber Asphalt Paving Co., 39.

Action to restrain defendant from maintaining a ditch on his farm land to transfer surface water to land of lower proprietors.

—Werner v. Popp, 118.

Where contract between divorced husband and wife, made to facilitate their divorce, is valid on its face but void as against public policy, court will enjoin divorced wife from prosecuting an action brought by her in violation of her agreement.

—McAllen v. Hodge, 237.

Writ to restrain defendant and its officers from making free use of village hall for conduct of private business of member of village council.

—Nerlien v. Village of Brooten, 361.

INSURANCE (EMPLOYER'S LIABILITY).

Where defendant company insured plaintiff against claims for accidental injuries suffered by his employees, the contract providing that immediate notice should be given to it of all claims, and defendant was notified of such a claim by boy whose employment was illegal, and took charge of the conduct of the litigation growing out of it which resulted in a judgment against plaintiff, defendant is estopped from denying its liability to plaintiff under contract of indemnity, notwithstanding the policy provided there should be no liability in case of injuries to any child employed contrary to law.

—Tozer v. Ocean Accident & Guarantee Corporation, 478.

INSURANCE (FIRE).

Defendants procured "short term participating policy" in an Ohio mutual insurance company and paid full premium for the period of insurance. Policy made no reference to contingent liability of insured and they gave no premium note. By-law of company provided no member should be liable for losses or debts of company except to extent of premium notes given by him. Insured property was destroyed by fire and loss was settled in full. Upon subsequent insolvency of company Ohio court levied assessment upon policy holders for payment of its liabilities. In action by trustee of company to collect assessment against defendants *held*, such assessment is conclusive upon its members as to necessity and amount of assessment, but is not conclusive as to question whether member is liable to assessment or as to any personal defense. Defendants are not estopped to assert their defense by fact that their loss was settled. Ohio statute (Laws 1888, p. 273) inapplicable.

—Swing v. Humbird, 1.

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INSURANCE (FIRE)—Continued.

Storekeeper, who by letter to foreign insurance brokers obtained policies of insurance in companies not licensed to do business in Minnesota after insurance company of which he was a local agent had refused the risk, is not personally liable to the owner of the property insured as an insurance agent under Laws 1895, c. 175, p. 392, § 25, or p. 437, § 87, unless the plaintiffs have been deceived by his acts.

—Webster v. Ferguson, 86.

Arbitration of amount of loss on fire insurance policy in Minnesota standard form, or waiver by company, is not a condition precedent to action on the policy unless parties actually disagree as to amount of loss. Complaint in action to recover on the policy may ask for reformation of policy to conform with the actual contract between insured and insurer, without alleging facts which show a necessity for reformation.

—Kelly v. Liverpool & London & Globe Insurance Co., 141.

Where each of the defendants issued to plaintiff its policy of fire insurance in Minnesota standard form, which provides that in case of concurrent insurance the liability of the insurer on the policy shall be limited to the proportion of the loss which the amount of the policy bears to the total valid insurance, and the insured sustained a partial loss, he can maintain one action against the several insurers to determine the liability of each.

—Fegelson v. Niagara Fire Insurance Co., 486.

INSURANCE (LIFE).

Where application for policy of insurance provided that the policy to be issued should not become binding on insurer until receipt of first premium, and the policy provided for payment of the premium in advance on delivery of the policy, and that, if any premium should not be paid when due, the policy should be void until reinstated; and the application was dated August 25, the policy was dated September 8 and delivered September 24, 1902, and the insured died September 11, 1903, after nonpayment of the premium due September 8, 1903, the policy was in force at the time of the insured's death.

—Stramback v. Fidelity Mutual Life Insurance Co., 281.

In an application for insurance where answers to questions and statements of medical history are warranties, there can be no recovery on the policy if these answers are shown to be affirmatively false. By apt words parties to insurance contract can make a fact material or may make it immaterial. Complicated and ambiguous conditions and qualifications of contract may involve construction of terms used so as to protect both insured and insurer from fraud. Words having a narrower meaning appropriate to the purpose will not be given a broader meaning not referring to good faith or hazard and demanding an impossibility. When questions propounded to applicant include trivial ailments unconnected with a specific disease, they should be interpreted to refer only to such

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INSURANCE (LIFE)—Continued.

ailments as affect the risk to be assumed, unless express terms forbid such construction. Answers which are expressions of opinion are warranties of belief of applicant. Questions concerning physical condition of applicant, or anything which tends to shorten his life, do not invariably require absolute truth in the answers. An answer concerning previous consultations with physicians which admits one examination and omits others clearly proved, but does not purport to be complete reply to all questions in that connection, and is accepted in its incomplete form, is not affirmatively shown to be false so as to prevent recovery on the policy.

—Rupert v. Supreme Court United Order of Foresters, 293.

INTOXICATING LIQUOR.

Under charter of Northfield an applicant for license to sell intoxicating liquors, who complies with provisions of the charter as to bond and payment of license fee, is not entitled to issue of license to him, if common council judges it for best interests of city to limit the number of licenses. Their decision is a judicial not a ministerial act and cannot be controlled by mandamus.

—State ex rel. v. Common Council of City of Northfield, 81.

JUDGMENT.

Where there was personal service of summons upon defendant and neither she nor her husband, to whom she handed the summons, employed an attorney for two years, and no excuse for the delay was offered, it was error to open the judgment taken by default and permit defendant to answer. Under such circumstances the court had no discretion.

—McClure v. Clarke, 37.

Judgment in local assessment proceedings under defendant's charter are like judgments in ordinary tax proceedings, and cannot be attacked collaterally by showing want of authority in city council to order improvement for which assessment was made.

—Hause v. City of St. Paul, 115.

Judgment is conclusive only against parties thereto and their privies. As to strangers it is evidence only of its entry, not of any fact on which it is based. Rule that judgment is admissible in evidence against all the world as a link in party's chain of title, applies particularly to judgments in partition, probate decrees, actions to foreclose mortgages or liens, and all judgments which operate proprio vigore to transfer title or render valid a link which without judgment would be defective. Such rule does not apply to ordinary judgments in actions to determine adverse claims except perhaps where the relief demanded is transfer of title.

—Minnesota Debenture Co. v. Johnson, 150.

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JUDGMENT—Continued.

Without authority from his client an attorney who recovers a judgment cannot compromise it for less than its face value.
—Burgraf v. Byrnes, 418.

Rule that where answer discloses a good defense upon the merits and a reasonable excuse for delay in its service, and no substantial prejudice caused by such delay, court will allow answer to be introduced—applied in opening default judgment in case where application showed answer was served one day after expiration of statutory time to answer, there was an attachment of defendant's land to protect plaintiff, and no delay in trial, and application to open judgment was made promptly.
—Walsh v. Boyle, 437.

In action to determine adverse claims person claiming judgment lien against plaintiff's real estate must prove his lien unless the same be admitted.
—Howe v. Nelson, 526.

JURY.

Laws 1903, p. 54, § 46, authorized district court for Benton county to summon grand or petit jury for the April, 1904, term.
—Marr v. Sherry, 131.

JUSTICE OF THE PEACE.

Notice of appeal from judgment in justice court, which stated defendant appealed from the judgment and the whole thereof, and demanded a new trial in the district court, was void.
—Buie v. Great Northern Railway Co., 405.

Under G. S. 1894, § 4991, a justice of the peace has no power to certify a cause to the district court, until the title to real estate comes in issue on the evidence. It is not sufficient that the pleadings show such issue. The improper certification of a cause ousts both courts of jurisdiction, and the district court cannot remand the case to the justice for trial. The only order the district court can enter is to dismiss the case.
—Sorenson v. Torvestad, 410.

The office of justice of the peace created by the special act incorporating the City of East Grand Forks was not abolished by Laws 1895, p. 16, c. 8, but the qualifications of the justice and the beginning of his term are regulated by the later act. The term of office of the justices elected at the general election of 1901 expired upon the qualification of their successors elected at the general election of 1903.
—Kane v. Arneson Mercantile Co., 451.

Where on return day of summons parties stipulated for an adjournment to May 30, the justice did not lose jurisdiction to try the case on that day because a legal holiday.
—Fureseth v. Great Northern Railway Co., 500.

On appeal from justice court on questions of law alone, where no rulings are complained of, the only question presented is whether the evidence

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JUSTICE OF THE PEACE—Continued.
given before the justice warranted findings of fact which would justify his judgment.
—Trace v. Voight, 527.

LABOR UNION.
See Trade Union.

LANDLORD AND TENANT.
In action for unpaid rent under written lease allegation and proof of payment is matter of defense and need not be made by plaintiff. Immaterial whether demand is for whole amount due or only for part.
—Montgomery v. Leuwer, 133.

LARCENY.
See Criminal Law, 50.

LICENSE.
Laws 1899, p. 92, c. 91, providing for licensing of persons operating steam boilers and steam machinery of any kind, do not have reference to ordinary steam-heating plants used for heating buildings occupied in part for business and in part for residence.
—State ex rel. v. Justus, 207.

LIEN.
An unpaid seller of goods has a lien on them while they are in his possession, but his lien is diverted by a delivery, unless there is a contract to the contrary.
—Meyers v. McAllister, 510.

LOGS AND LOGGING.
Where landowner gave third person right to cut and remove timber from his land within specified dates, the title to logs cut before, but not removed until after, expiration of term passed to the logger. Otherwise as to title to logs cut after the expiration of the term.
—Alexander v. Bauer, 174.

MANDAMUS.
Action of common council of Northfield in deciding whether license for sale of intoxicating liquor shall be issued, cannot be controlled by mandamus.
—State ex rel. v. Common Council of City of Northfield, 81.
Peremptory writ directing judges and clerk of district court to transmit files and records in certain action to district court for another county.
—State ex rel. v. District Court of Pine County, 370.

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MANDAMUS—Continued.

Alternative writ for purpose of compelling district judge to allow and settle a "case" discharged.
—State ex rel. v. Kelly, 407.

MASTER AND SERVANT.

Personal injury to miner at work one hundred fifty feet below surface of ground, on stairway in shaft of mine, caused by defendant company directing planks to be carried down the stairway, instead of down the skipway, was not one of risks of employment assumed by plaintiff when he had no warning or knowledge of the act. Negligence of defendant was proximate cause of injury.
—Jensen v. Commodore Mining Co., 53.

In action for personal injury based on engineer's negligence, where brakeman at rear of loaded ore train, distant one thousand feet from engineer, gave signal to back the train and prepared himself against backward movement, but was thrown from train by engineer starting train forward to take out slack between the cars, verdict for plaintiff was set aside and judgment ordered for defendant.
—Phillips v. Great Northern Railway Co., 110.

Whether evidence showed that master failed to supply servant with reasonably safe brace for support when standing on ladder made of cleats question for jury.
—Haidt v. Swift & Co., 146.

Whether defendant master was liable to servant for failure of its superintendent to give to plaintiff customary signal of blast in its stone quarry a question for the jury. Under the circumstances of case superintendent was vice principal. Test of whether person is vice principal is the nature of employment in which he is engaged; is whether he has the performance of some absolute duty due from master to servant.
—Hjelm v. Western Granite Contracting Co., 169.

Defendant master not liable for negligence in failing properly to pack and cover blast in its stone quarry, where the details leading up to explosion were in control of plaintiff and his fellow servant.
—Hjelm v. Western Granite Contracting Co., 169.

Where in construction of building common laborer was injured by falling through floor and had no connection with work of laying it, he had the right to assume the floor was properly laid and the risk of falling through a hole in it was not a risk incident to his employment. Whether it was negligent in the master to leave the hole unguarded was a question for the jury. Whether plaintiff was guilty of contributory negligence in method of handling timber was a question for jury.
—Merrill v. Pike, 186.

In action for personal injury question whether master was negligent in leaving ditch across railroad embankment unguarded and unlighted, and question whether servant was guilty of contributory negligence in

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MASTER AND SERVANT—Continued.

walking on railroad embankment, are for the jury. Requests to charge jury need not be given if court fully covers requested instructions in its general charge.

—Hebert v. Interstate Iron Co., 257.

MECHANIC'S LIEN.

The validity of a mechanic's lien may be determined in proceedings under Laws 1901, p. 348, c. 237, to register title to real estate, but the filing of an answer setting up the existence of a mechanic's lien is not equivalent to the beginning of an action to foreclose such lien and does not operate to extend the lien beyond the period limited for its foreclosure by the general statutes.

—Reed v. Siddall, 216.

MORTGAGE.

In action to foreclose mortgage the court found as facts that mortgagors executed the note and mortgage pursuant to oral agreement with mortgagee (their son-in-law) to pay off prior mortgage, and contemporaneously with delivery of mortgage mortgagors delivered deed to mortgagee, the actual consideration for the deed being oral agreement to furnish home and support for grantors during their life. That parties did not intend merger of title by delivery of deed. That mortgage was purchased by plaintiff for value without notice of subsequent deed. That he received the mortgage without written assignment, and received a copy of the mortgage note, which appeared to be and purchaser believed to be the original note, upon which was an indorsement of assignment of the note and all "interest in all my rights under the mortgage securing the same" signed by the mortgagee. That assignor was in possession of mortgaged premises as his homestead and mortgagors resided there. That mortgagors' deed was subsequently recorded and grantee therein later conveyed the premises by deed to person who executed a purchase-money mortgage which was recorded and assigned for full value to defendant Meyer who defended the action. Court's findings as conclusions of law that there was no merger of the mortgage and deed, that title to note and mortgage passed to plaintiff, that the lien of the purchase-money mortgage was subsequent to that of the mortgage of plaintiff, who was entitled to have it foreclosed—are supported by evidence. Non-delivery of original note does not affect transfer of title to the mortgage.

—Bloomer v. Burke, 15.

Grantee of mortgagor who has covenanted to pay taxes may buy tax titles to mortgaged premises as against mortgagee after latter has sold and assigned the mortgage.

—Ross v. Cale, 513.

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MOTION.

Motion by each party that a verdict be directed in his favor does not waive right to have the facts passed on by the jury, and is not equivalent to an agreement to submit them to the trial judge in case motion is denied.
—Stauff v. Bingenheimer, 309.

MUNICIPAL CORPORATION.

Action to enjoin paving company from paving street in front of plaintiffs' property changed by bringing in the city and its officers, and filing a supplemental complaint, into an action to test the validity of the contract between the city and the paving company, and to restrain the city from making any citizens liable for the expense of work already done upon other parts of the street.
—Patterson v. Barber Asphalt Paving Co., 39.

The charter of any city incorporated under Const. art. 4, § 36, allowing cities to frame their own charters and providing that such charter shall be in harmony with the constitution and laws of Minnesota, must comply with the public policy of the state, but on any subject appropriate to the orderly conduct of municipal affairs it may differ in detail from those of existing laws. Provisions of charter of St. Paul relating to notice to principal and sureties on bond of contractor for public improvements supersede provisions of general law on that subject. Laws 1897, p. 568, c. 307, § 3.
—Grant v. Berrisford, 45.

Where defendant's charter provided that its deeds to purchasers at sales for unpaid local assessments should be prima facie evidence of title in purchaser after the time for redemption had expired, (the time for redemption being five years) and no sale should be declared invalid unless an action was brought within three years from the date of sale, but if the sale was held invalid the purchaser should have right to return of money paid, the purchaser's right to refundment does not depend on an action to test the validity of the sale being brought within three years. Otherwise in case of fraud or laches.
—Otis v. City of St. Paul, 57.

Section 277 of the charter of Duluth, forbidding any assignment of a contract for public work, does not forbid or render void an assignment of the amount due from the city after the work has actually been completed. The affidavit that all claims for labor have been paid, required by section 276, may be made by the assignee of the contract.
—Lowry v. City of Duluth, 95.

In local assessment proceedings under defendant's charter judgments cannot be attacked collaterally by showing want of authority in common council to order improvement for which assessment was made. Want of proper petitions for improvement signed by owners of property.
—Hause v. City of St. Paul, 115.

Where plaintiff built a sewer at public expense and its city council adopted

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MUNICIPAL CORPORATION—Continued.

a resolution that any person might connect his premises adjoining the sewer by payment of specified sum, the defendant was liable to the payment, although his premises were directly connected with a sewer in another street which he had built to a connection with the former sewer.

—City of Fergus Falls v. Edison, 121.

Unless expressly prohibited municipal corporation may reimburse its chief of police for expenses incurred by him in defending an action for false imprisonment brought by person the officer had arrested for violation of city ordinance.

—City of Moorhead v. Murphy, 123.

Contract by village for purchase of fire apparatus, entered into under authority of statute, is not ultra vires because village was part of same election and assessment district as neighboring town.

—Du Toit v. Village of Belview, 128.

Laws 1903, p. 690, c. 382, relating to assessments for public improvements in certain cities, and the issue of evidences of debt, not obnoxious to Const. art. 4, § 27. The legislature can compel any of the political subdivisions of the state to recognize and pay obligations not recognized in any court of law but based on moral and equitable grounds.

—Merchants National Bank of St. Paul v. City of East Grand Forks, 246.

Foot passengers and drivers of vehicles have equal rights on the streets of a city. Neither is required to anticipate negligence. Both are bound to exercise commensurate care to avoid injury. If the negligence of a person hurt, while properly on the highway, has in any degree caused his injury, he cannot recover from another person, in the proper use of the highway, who may have contributed thereto. Rule applied in case of city laborer, engaged in repairing sidewalk who leaves his push cart standing in a narrow street at an angle with the curb, and unnecessarily puts his foot between the cart and the curb and is injured. Questions of negligence and contributory negligence for the jury.

—Richardson v. Davis, 315.

The free use of village hall for conduct of private business of member of village council and of the services of the village marshal in such business may be restrained by injunction at suit of person injuriously affected.

—Nerlien v. Village of Brooten, 361.

A bond, in the hands of a bona fide holder, issued by a township under statute prescribing a public record as determinative of the amount of authorized issue, which on its face exceeds the limit of the entire issue proper under such record produced, is void as to such excess notwithstanding recitals therein of compliance with all legal requirements and payment of interest thereon.

—Corbet v. Town of Rocksbury, 397.

Villages organized under the general law have no power to construct or

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MUNICIPAL CORPORATION—Continued.
contract for construction of sewers until the property owners have an opportunity to perform the work under Laws 1901, p. 215, c. 167.
—State v. Foster, 412.

NEGLIGENCE.
If defendant mining company, in exercise of ordinary care, ought to have anticipated that miner at work one hundred fifty feet below surface of ground on stairway in shaft of mine would be injured by directing other servants to carry planks down stairway, it was guilty of negligence.
—Jensen v. Commodore Mining Co., 53.
Where person who contracted to unload logs delivered by defendant was permitted to ride on its switch engines, and was told by yardmaster to flag engines by standing in center of track, he was guilty of contributory negligence by remaining on the track in front of an approaching locomotive which did not slow down until it was within two feet of him.
—Gallagher v. Northern Pacific Railway Co., 64.
Where the defense in an action for injury caused by suddenly starting street car while plaintiff was alighting, was that she stepped off the car before it stopped, and was thus guilty of contributory negligence, it was not error to instruct jury that if plaintiff did get off the moving car, it was a question of fact for the jury whether person of ordinary care would have stepped off under same circumstances. Proper to refuse request to instruct jury that plaintiff could not recover if she stepped off, because request was indefinite as to speed of car.
—Cody v. Duluth Street Railway Co., 74.
Boy four years and a half old and sister eleven years old in charge of him are not guilty of contributory negligence, because in crossing street in front of car boy runs ahead and sister pursues to catch hold of him. Parents were not guilty of negligence in entrusting boy to care of older sister. Whether driver was guilty of negligence in not attempting to slacken speed of electric car until within twelve feet of child was question for the jury. Wanton negligence of motoneer not in issue. Verdict of $2,000 for injury to boy not excessive.
—Cameron v. Duluth-Superior Traction Co., 104.
In action for personal injury based on engineer's negligence, where brakeman at rear of loaded ore train, distant one thousand feet from engineer, gave signal to back the train and prepared himself against backward movement, but was thrown from train by engineer starting train forward to take out slack between the cars, verdict for plaintiff was set aside and judgment ordered for defendant.
—Phillips v. Great Northern Railway Co., 110.
Whether servant exercised due care and whether master failed to supply servant with reasonably safe brace for support when standing on ladder made of cleats questions for jury.
—Haidt v. Swift & Co., 146.

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NEGLIGENCE—Continued.

Whether plaintiff's intestate was guilty of contributory negligence in walking upon railroad crossing at night where the safety gates at each side of crossing were open, with lighted lanterns at the top of each, just before a train was about to pass, is a question of fact for the jury.

—Stegner v. Chicago, Milwaukee & St. Paul Railway Co., 166.

Defendant master not liable for negligence in failing properly to pack and cover blast in its stone quarry, where the details leading up to explosion were in control of plaintiff and his fellow servant.

—Hjelm v. Western Granite Contracting Co., 169.

Whether defendant master was liable to servant for failure of its superintendent to give to plaintiff customary signal of blast in its stone quarry a question for the jury. Under the circumstances of case superintendent was vice principal. Test of whether person is vice principal is the nature of employment in which he is engaged; is whether he has the performance of some absolute duty due from master to servant.

—Hjelm v. Western Granite Contracting Co., 169.

Where common laborer was employed on the construction of a building he had the right to assume the floor was properly laid, and the risk of falling through a hole in it was not a risk of his employment. Whether master was negligent in leaving the opening unguarded was a question for the jury. Whether servant's method of handling a timber was contributory negligence was also a question for the jury.

—Merrill v. Pike, 186.

Where plaintiff's intestate was killed while engaged in switching gondola cars in defendant's yard, the evidence was insufficient to show any negligence on part of defendant.

—Griffin v. Minnesota Transfer Railway Co., 191.

Where woman passenger was thrown from railway train when about to alight at a station the question of her contributory negligence was for the jury. Where she suffered at time of trial from curvature of spine and a floating kidney verdict of two thousand dollars was not excessive, if these troubles were occasioned by her fall. Plaintiff entitled to recover damages for all of direct consequences of her injuries—future as well as past—but only for such future consequences as were shown, to a reasonable certainty, would result from her injuries. Charge to jury was not error because not a correct statement of reciprocal duties of carrier and passenger. Neither was an instruction that it was not negligence to alight at the rear door of the car.

—Olson v. Chicago, Milwaukee & St. Paul Railway Co., 241.

In action for personal injury question whether master was negligent in leaving ditch across railroad embankment unguarded and unlighted, and question whether servant was guilty of contributory negligence in walking on railroad embankment in going home from work, are for the jury.

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NEGLIGENCE—Continued.

Requests to charge jury need not be given if court fully covers requested instructions in its general charge.

—Hebert v. Interstate Iron Co., 257.

Common carrier's duty is to forward promptly goods delivered to him. If he negligently delays the shipment so that while in transit the goods are damaged by an act of God which would not have harmed them except for the delay, the carrier is liable even when the act of God could not have been foreseen. The negligent delay is such a proximate cause as to render carrier liable, whether goods are perishable or otherwise. These rules applied in action for loss of car of broom corn in flood at Kansas City where defendant failed to notify connecting carrier of arrival of car.

—Bibb Broom Corn Co. v. Atchison, Topeka & Santa Fe Railway Co., 269.

Rule that to entitle person to recover for injury to his person because of negligence of another, it must appear some duty existed on the part of the latter to the person injured, applied in case where boy was clinging to steps of passenger train in violation of statute, and was injured by collision with train of another company at railway crossing, although statute required all trains to come to full stop before passing over track of another railroad.

—Wickenburg v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co., 276.

Foot passengers and drivers of vehicles have equal rights on the streets of a city. Neither is required to anticipate negligence; both are bound to exercise commensurate care to avoid injury. If the negligence of a person hurt, while properly on the highway, has in any degree caused his injury, he cannot recover from another person, in the proper use of the highway, who may have contributed thereto. Rule applied in case of city laborer, engaged in repairing sidewalk who leaves his push cart standing in a narrow street at an angle with the curb, and unnecessarily puts his foot between the cart and the curb and is injured. Questions of negligence and contributory negligence for the jury.

—Richardson v. Davis, 315.

In an action wherein defendant's switchman, who passed in front of moving cars to set switch, sought recovery of damages for negligence of fellow servant under Wisconsin statute, complaint was *held* good on demurrer. Averments in complaint that plaintiff was acting in performance of his duty repel an inference that he was guilty of contributory negligence.

—Pope v. Great Northern Railway Co., 429.

Court rightly granted a new trial for inadequacy of damages in action to recover damages for death of plaintiff's intestate, caused by wilful negligence of defendant, where verdict for plaintiff was one dollar.

—Rawitzer v. St. Paul City Railway Co., 494.

In case where there was no direct evidence of defendant's negligence, but

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NEGLIGENCE—Continued.

plaintiff's horse was caught in telephone wire near the ground while passing over railroad track, jury was justified in inferring negligence from the facts shown.

—Halvorson v. Chicago, Milwaukee & St. Paul Railway Co., 531.

NEW TRIAL.

Where verdict was sustained by the evidence and it did not appear affirmatively that trial court granted a new trial in the exercise of its discretion, the order granting new trial will be reversed.

—Briggs v. Rutherford, 23.

Where order denied motion of defendants for judgment notwithstanding verdict, granted their motion for a new trial, but failed to state on what ground the order was based, and the evidence reasonably tends to support the verdict, and no errors appear in the rulings of the court or in the charge to the jury, the order granting a new trial must be reversed.

—Merrill v. Pike, 186.

Except in clear case court is not justified in directing judgment notwithstanding verdict that a will in favor of testator's child was obtained by undue influence. Where suspicious circumstances make case doubtful a new trial should be granted. That remedy has not been changed by Laws 1895, p. 729, c. 320.

—Fischer v. Sperl, 421.

Where trial court considers verdict is supported by some evidence but is against the weight of evidence, it may well be influenced to set the verdict aside, when it would not feel warranted in disturbing a second verdict on the same evidence.

—Atwood Lumber Co. v. Watkins, 464.

Court rightly granted a new trial for inadequacy of damages in action to recover damages for death of plaintiff's intestate, caused by wilful negligence of defendant, where verdict for plaintiff was one dollar.

—Rawitzer v. St. Paul City Railway Co., 494.

An order granting a new trial because evidence is insufficient to sustain verdict is discretionary with court. Effect of such order is to leave case precisely as if no trial had ever been had. Mere fact that new trial is ordered on ground that evidence is insufficient to sustain verdict does not entitle successful party to directed verdict on second trial, if evidence is substantially the same as on first trial.

—McKenzie v. Banks, 496.

Not error to deny conditionally new trial after second verdict for plaintiff where plaintiff and husband testified in her favor, and defendant, her husband, and six other witnesses denied testimony of plaintiff.

—McKenzie v. Banks, 496.

On appeal an order for new trial will be sustained, if it can be justified on any of the grounds specified in the motion for new trial. Possible surprise of plaintiff's attorney at being unable to prove his case by

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NEW TRIAL—Continued.

introduction of cross-examination of defendant's witnesses good ground for exercise of court's discretion.

—Stitt v. Rat Portage Lumber Co., 529.

NOTICE.

Where defendant merchants gratuitously disbursed plaintiff's money in cashing checks of their buyer of cattle and were notified by plaintiffs: "Don't pay any money out except for stock," they were not liable for money subsequently paid by them on checks which appeared to be for cash but in fact were for stock. Reversible error to direct verdict.

—Miller v. Dayton, 340.

OFFICER.

Unless expressly prohibited municipal corporation may reimburse its chief of police for expenses incurred by him in defending an action for false imprisonment brought by person the officer had arrested for violation of city ordinance.

—City of Moorhead v. Murphy, 123.

Person who receives proper appointment under G. S. 1894, § 715, as deputy county auditor during auditor's first term and continues to serve as deputy during auditor's second term without new appointment is deputy de facto and, so far as public is concerned, authorized to perform duties of deputy.

—Board of County Commissioners of Ramsey County v. Sullivan, 201.

PARTIES TO ACTION.

In appeal by plaintiff from judgment in favor of intervening claimant, neither the garnishee nor defendant in the municipal court are necessary parties to the appeal to the district court.

—Peterson v. Knuutila, 114.

Where each of the defendants issued to plaintiff its policy of fire insurance in Minnesota standard form, which provides that in case of concurrent insurance the liability of the insurer of the policy shall be limited to the proportion of the loss which the amount of the policy bears to the total valid insurance, and the insured sustained a partial loss, he can maintain one action against the several insurers to determine the liability of each.

—Fegelson v. Niagara Fire Insurance Co., 486.

PARTNERSHIP.

A full discharge of individual liability of one partner on a firm debt may be had in bankruptcy proceedings concerning that individual partner. Rule applied in action by assignee of judgment creditor against two partners to renew the judgment.

—Loomis v. Wallblom, 392.

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PAYMENT.

In action for specific amount due under written obligation, allegation and proof of payment is matter of defense, whether action is for whole sum due or for part.

—Montgomery v. Leuwer, 133.

An itemized bill marked paid is a receipt of the items contained in that bill.

—Steffens v. Nelson, 365.

PHYSICIAN AND SURGEON.

Evidence insufficient to warrant finding that plaintiff had been employed as consulting physician by defendant.

—Trace v. Voight, 527.

PLAT.

Where owner conveyed urban property in accordance with descriptions contained in an unrecorded plat, the effect, in the absence of statute, was to dedicate streets and alleys therein described to public use. Purchasers with reference to such plat are entitled, as between themselves and the grantor, to the use of such streets and alleys. Since Laws 1899, p. 174, c. 168, such plat must be approved by village council.

—Nagel v. Dean, 25.

PLEADING.

Complaint which alleged conspiracy between plaintiffs' agent in making contract to sell land at certain price per acre, his brothers and the several purchasers of the land to defraud plaintiffs, alleged sales in pursuance of such purpose at higher price per acre to certain defendants, misappropriation of plaintiffs' money by agent and purchase by defendant brothers of titles adverse to plaintiffs and prayed for money judgment for the various amounts converted, cancellation of deeds and mortgages, *held* bad on demurrer for misjoinder of several causes of action, it appearing that each purchaser was ignorant of and not connected with original conspiracy and that each purchase constituted an independent transaction.

—Hanna v. Duxbury, 8.

Where the obligation of party to agreement is to pay on the happening of a contingency, an allegation in complaint that "defendant promised and agreed to repay plaintiff on demand" is insufficient. Where defendant was not misled in any way at the trial, trial court should permit amendment to complaint, even after judgment, so as to conform to facts proved.

—Briggs v. Rutherford, 23.

In an action by minority stockholder against corporation (of which he had been president for eight years) and others, a complaint which alleged that plaintiff subscribed for thirty shares of stock which were pledged to another stockholder as collateral for payment of his promissory note

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PLEADING—Continued.

for par value of stock; that majority stockholders conspired with the corporation to prevent dividends so as to prevent payment of note and deprive plaintiff of his rights in the stock; that no dividends were declared, although business was prosperous and the earnings due the thirty shares were sufficient to pay plaintiff's note, with interest, and leave large sum due plaintiff; that defendants made a fraudulent cancellation of plaintiff's certificates of stock for purpose of destroying evidence of plaintiff's ownership of stock, and have refused to issue or deliver to him new certificates; and contained a prayer for an accounting and that corporation be compelled to declare a dividend of its earnings, and out of the same the note be paid and balance paid to plaintiff—was held good against separate demurrers (1) that the complaint did not state facts sufficient to constitute a cause of action, and (2) that several causes of action were improperly united. The demurrers on the ground (3) that there was a defect of parties plaintiff and defendant were defective in not specifically naming the person or persons who should have been joined.

—Anderson v. W. J. Dyer & Bro., 30.

Original complaint alleged that certain street, by authority of City of Mankato, was graded and curbed at expense of abutting owners; that thereafter under contract between city and defendant latter threatened to enter street abutting on plaintiffs' property, destroy the improvements so made and pave the street; and that contract was void. Plaintiffs, after obtaining a temporary injunction against the paving company, and after balance of street had been paved, by permission made the city and its officers parties defendant and filed a supplemental complaint, which alleged facts tending to show invalidity of contract and prayed for an injunction restraining defendant from paving any part of the street; that contract be declared void and that city and its officers be restrained from levying or collecting any assessment upon abutting property for work done under the contract. The paving company, having meanwhile brought suit against the city in the U. S. Circuit Court for work done under the contract and recovered a judgment, and an appeal therefrom pending in the Circuit Court of Appeals, obtained leave to interpose an answer to the supplemental complaint, which alleged that contract having been held void by Supreme Court of Minnesota in an action to which it was not a party, it abandoned the contract and was released by a formal resolution of the city council from further performance of the contract in front of plaintiffs' property. These allegations being admitted in the reply a general demurrer to the reply was properly overruled.

—Patterson v. Barber Asphalt Paving Co., 39.

Complaint in action by materialman against sureties on bond of contractor given pursuant to provisions of 1900 charter of City of St. Paul, which omitted to allege notice to principal and sureties as required by Laws 1897, p. 568, c. 307, § 3, sustained on demurrer.

—Grant v. Berrisford, 45.

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PLEADING—Continued.

In action on promissory note where the answer admitted the execution of the note, but denied its delivery to the indorsee or to any one else, and alleged it was given him to be left at designated bank under an agreement concerning the issue of a life insurance policy, if the answer merely alleged an oral agreement varying the terms of a written contract it stated no defense. But if the answer alleged an oral agreement that note should be operative only on happening of some future event, it stated a defense.

—Mendenhall v. Ulrich, 100.

Demurrer sustained where complaint alleged plaintiff was owner and in possession of certain platted lots; that defendant city became the trustee of and used the streets dedicated; that from time to time the railroad company unlawfully entered upon part of a certain street which was not part of its right of way and not vacated, and has built and uses railroad tracks thereon; that the public and plaintiff are excluded from use of the street which they have right to use; that plaintiff demanded removal of tracks, and prayed for removal of tracks.

—Guilford v. Minneapolis & St. Louis Railroad Co., 108.

In action for unpaid rent under written lease allegation and proof of payment is matter of defense and need not be made by plaintiff. Immaterial whether demand is for whole amount due or only for part.

—Montgomery v. Leuwer, 133.

Claim of principal against his agent for profit alleged to have been made by agent in the course of his employment may be interposed as counterclaim in action by agent against the principal for services rendered in another transaction.

—Schick v. Suttle, 135.

Complaint which alleged that an agent for sale of land (plaintiff) made oral agreement with defendant by which latter promised to aid plaintiff in making the sale in return for specified part of agent's commission, and that agreement was cancelled because of misrepresentations of defendant, sustained as against a general demurrer.

—Barnett v. Block, 138.

The complaint in an action to recover on a fire insurance policy in Minnesota standard form is good on demurrer, without an allegation that an arbitration was or was not had, or was waived by the insurance company. Such complaint may also ask for reformation of policy to conform with the actual contract between insured and insurer, without alleging facts which show necessity for reformation.

—Kelly v. Liverpool & London & Globe Insurance Co., 141.

In proceedings under Laws 1901, p. 348, c. 237, to register title to real estate, the filing of an answer setting up the existence of a mechanic's lien is not equivalent to the beginning of an action to foreclose such lien and does not operate to extend the lien beyond the period limited for its foreclosure by the general statutes.

—Reed v. Siddall, 216.

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PLEADING—Continued.

Where complaint alleges execution of promissory note by defendant and answer contains a general denial and new matter not constituting a defense in law, it is proper to strike out the answer as sham and frivolous, if it be made conclusively to appear that he did execute the note. An order denying a motion to file an amended answer which, if consistent with original answer, stated no defense, not an abuse of discretion.

—First National Bank of St. Cloud v. Lang, 261.

Where original complaint sought absolute divorce because of adultery, and original answer sought divorce for same cause, and amended complaint sought to annul the marriage because of defendant's former marriage not legally dissolved, and amended answer alleged a valid divorce of defendant and prayed for alimony and suit money, demurrer to answer on ground that in action to annul marriage defendant cannot secure divorce because of adultery of plaintiff was properly overruled.

—Sodini v. Sodini, 301.

Question whether within rule of Ehrmanntraut v. Robinson, 52 Minn. 333, on law of principal and agent, complaint stated a cause of action in favor of one member of plaintiff association against the individual members of defendant trade union was not presented by demurrer to complaint by individual members of union.

—St. Paul Typothetae v. St. Paul Bookbinders' Union, 351.

As against a demurrer the complaint in an action to recover money lost in playing games of chance stated a good cause of action, there was no defect of parties nor an improper joinder of several causes of action.

—Parsons v. Wilson, 416.

In an action wherein defendant's switchman, who passed in front of moving cars to set switch, sought recovery of damages for negligence of fellow servant under Wisconsin statute, complaint was *held* good on demurrer. Averments in complaint that plaintiff was acting in performance of his duty repel an inference that he was guilty of contributory negligence.

—Pope v. Great Northern Railway Co., 429.

Rule that where answer discloses a good defense upon the merits and a reasonable excuse for delay in its service, and no substantial prejudice caused by such delay, court will allow answer to be introduced—applied in opening default judgment in case where application showed answer was served one day after expiration of statutory time to answer, there was an attachment of defendant's land to protect plaintiff, and no delay in trial, and application to open judgment was made promptly.

—Walsh v. Boyle, 437.

In action by trustee in bankruptcy of private bankers against defendant bank to recover amount on deposit belonging to them, answer which alleged that one of insolvents was indebted to defendant for balance on past due unpaid promissory note executed by him and another and that amount of his deposit with defendant at time of his insolvency was applied to his credit on its books in payment of his promissory note,

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PLEADING—Continued.

states a good defense as against a demurrer. Question whether claim in favor of one person may be set off against debt due jointly from that person and another rendered immaterial by admissions of demurrer.

—Habegger v. First National Bank of St. Paul, 445.

Complaint in action to set aside judgment recovered against plaintiff in justice court of East Grand Forks, which alleged issue of summons by one justice of the peace, service on plaintiff, and on the return day, February 5, 1904, removal of cause to another justice; that at general election of 1901 second justice was duly elected, that his term did not expire until April, 1904, as provided by Sp. Laws 1887, p. 602, c. 45; that person who issued summons since January 6, 1904, had been a usurper and issued summons without authority, is bad on demurrer because it appears from its face court had no jurisdiction of the subject-matter, and it does not state facts sufficient to constitute a cause of action, there being no allegation that the justice issuing the summons had been elected at the general election next preceding and had qualified.

—Kane v. Arneson Mercantile Co., 451.

In action upon protested check where answer admitted its execution but alleged there was no consideration whatever for its execution and delivery, "or, if any, said consideration has wholly failed," the defense of no consideration was properly pleaded, but the allegation that consideration had failed was insufficient to admit evidence that plaintiff had failed to perform certain promises he had made subsequent to delivery of check.

—Grimes v. Ericson, 461.

In action for conversion of certain shares of its capital stock by defendant the complaint stated a cause of action, although it failed to allege the value of the stock in addition to the damages sustained by plaintiff. The refusal of defendant to transfer the stock on its books and its assertion of the right to cancel the stock was a conversion of it.

—Humphreys v. Minnesota Clay Co., 469.

Complaint in action against defendant company to recover on contract to indemnify plaintiff against claims for accidental injuries to his employees, which set out the contract, and the facts connected with certain litigation, the conduct of which was in charge of defendant, which resulted in a judgment against plaintiff, but the claim was by a boy whose employment was illegal and such claims were excepted by the contract, *held* good on demurrer.

—Tozer v. Ocean Accident & Guarantee Corporation, 478.

Where each of defendants issued to plaintiff its policy of fire insurance in Minnesota standard form, which provides that in case of partial loss the liability of insurer shall be limited to the proportion of the loss which the amount of its policy bears to the total valid insurance, a complaint in an action against the several insurers to determine the liability of each was *held* good as against a demurrer that several causes of action were improperly united.

—Fegelson v. Niagara Fire Insurance Co., 486.

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PLEADING—Continued.

Where answer does not allege that foreign administrator has failed to file a copy of his letters of administration in the probate court for county where action is brought, as required by G. S. 1894, § 5917, the objection is waived under section 5235. Fogel v. Schaeffer, 23 Minn. 304, distinguished.

—Pope v. Waugh, 502.

PRINCIPAL AND AGENT.

All profits and benefits accruing from act of agent, whether resulting from performance or violation of his duty, belong to principal and not to agent.

—Schick v. Suttle, 135.

Where defendant merchants gratuitously disbursed plaintiffs' money in cashing checks of their buyer of cattle and were notified by plaintiffs: "Don't pay any money out except for stock," they were not liable for money subsequently paid by them on checks which appeared to be for cash but in fact were for stock. Reversible error to direct verdict.

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—St. Paul Typothetae v. St. Paul Bookbinders' Union, 351.

If a husband ratify the act of his wife in signing a receipt in his name without authority, the ratification extends to the natural use of that receipt, including its production to the debtor as evidence of payment, although the check given in exchange for the receipt, indorsed by the principal after such use of the receipt, is not paid.

—Steffens v. Nelson, 365.

In action of conversion for property received by local agent of plaintiff upon sale of farm machinery, evidence that plaintiff's general agent allowed defendant the property in lieu of commission was received without objection, and the evidence reasonably supports the verdict.

—Minneapolis Threshing Machine Co. v. Burton, 467.

PRINCIPAL AND SURETY.

Where county treasurer in good faith delivered to deputy county auditor checks for amounts of, and payable to persons named in, redemption and refundment orders forged by deputy on customary blanks used by auditor, neither the treasurer nor the sureties on his official bond are liable to the county for such amounts.

—Board of County Commissioners of Ramsey County v. Elmund, 196.

County auditor and sureties on his official bond *held* liable for acts of his deputy in forging and presenting redemption and refundment orders on

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PRINCIPAL AND SURETY—Continued.

county treasurer, whether deputy were de facto or de jure officer, and irrespective of negligence of county treasurer.

—Board of County Commissioners of Ramsey County v. Sullivan, 201.

PRIVILEGED COMMUNICATION.

Professional communications are not privileged if made in furtherance of a criminal purpose, but the court did not abuse its discretion in refusing to receive in evidence testimony that plaintiff had asked the witness (a physician) to produce a miscarriage upon her, the issue being whether defendant pushed plaintiff against a box.

—McKenzie v. Banks, 496.

PROCESS.

Upon collateral attack on default judgment return of service of summons and complaint will be construed sufficient if language can be thus construed fairly. Rule applied in case where action in divorce was against Robert J. Nelson and return showed service on John S. Bradley, who sometimes passed as Robert J. Nelson, that sheriff personally knew the defendant and knew him to be the person named as defendant; that his true name was not Robert J. Nelson but John S. Bradley, and that the name of Robert J. Nelson was an alias.

—Sodini v. Sodini, 301.

PUBLIC LAND.

The assignee of a soldier's additional homestead certificate acquires an equitable title to the specific land for which his certificate is properly filed. When the government patent issues to him, his legal title relates back to the date of his application. Such equitable interest may be conveyed by quitclaim deed and the legal title will then inure to the grantee. After the issue of the patent such grantee may maintain action for damages for trespass upon the land committed between the date of the application and the date of the patent.

—Gilbert v. McDonald, 289.

Until federal government parts with the legal title the courts have no jurisdiction over controversy concerning title to public land between homestead entryman who has made final proof and railroad company claiming it as part of its land grant.

—Humbird v. Alger, Smith & Co., 523.

RAILWAY.

Whether plaintiff's intestate was guilty of contributory negligence in walking upon railroad crossing at night where the safety gates at each side of crossing, with lighted lanterns at the top of each, were open, just before a train was about to pass, is a question of fact for the jury.

—Stegner v. Chicago, Milwaukee & St. Paul Railway Co., 166.

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RAILWAY—Continued.

Where plaintiff's intestate was killed while engaged in switching gondola cars in defendant's yard, the evidence was insufficient to show any negligence on part of defendant.

—Griffin v. Minnesota Transfer Railway Co., 191.

Where bill of lading issued by initial carrier for goods to be transported over connecting lines of railroad contains no agreement on subject of route, and there are several routes, the right to designate one rests with the carrier and becomes part of contract. But the contract may be changed in this respect by subsequent parol agreement between the shipper and the carrier. Violation of such contract entitles injured shipper to damages.

—Steidl v. Minneapolis & St. Louis Railroad Co., 233.

Where woman passenger was thrown from railway train when about to alight at a station the question of her contributory negligence was for the jury. Where she suffered at time of trial from curvature of spine and a floating kidney verdict of two thousand dollars was not excessive, if these troubles were occasioned by her fall. Plaintiff entitled to recover damages for all of direct consequences of her injuries—future as well as past—but only for such future consequences as were shown, to a reasonable certainty, would result from her injuries. Charge to jury was not error because not a correct statement of reciprocal duties of carrier and passenger. Neither was an instruction that it was not negligence to alight at the rear door of the car.

—Olson v. Chicago, Milwaukee & St. Paul Railway Co., 241.

Common carrier's duty is to forward promptly goods delivered to him. If he negligently delays the shipment so that while in transit the goods are damaged by an act of God which would not have harmed them except for the delay, the carrier is liable even when the act of God could not have been foreseen. The negligent delay is such a proximate cause as to render carrier liable, whether goods are perishable or otherwise. These rules applied in action for loss of car of broom corn in flood at Kansas City where defendant failed to notify connecting carrier of arrival of car.

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Rule that to entitle person to recover for injury to his person because of negligence of another, it must appear some duty existed on the part of the latter to the person injured, applied in case where boy was clinging to steps of passenger train in violation of statute and was injured by collision with train of another company at railway crossing, although statute required all trains to come to full stop before passing over track of another railroad.

—Wickenburg v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co., 276.

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RAILWAY—Continued.

servant under Wisconsin statute, complaint was *held* good on demurrer. Averments in complaint that plaintiff was acting in performance of his duty repel an inference that he was guilty of contributory negligence.

—Pope v. Great Northern Railway Co., 429.

REFORMATION OF INSTRUMENT.

A complaint is good against a general demurrer, when it states a cause of action upon a policy of fire insurance and prays for reformation of the policy to conform with the actual contract between insured and insurer, although no facts are alleged which show any necessity for reforming the policy.

—Kelly v. Liverpool & London & Globe Insurance Co., 141.

To obtain from court of equity the reformation of a written instrument, it must appear substantially, as alleged in pleadings, there was in fact a valid agreement expressing the real intention of the parties; there was a written contract which failed to express such intention; and this failure was due to mistake of both parties or mistake of one and fraud of other party. Mere preponderance of evidence to prove these facts is not sufficient. Relief will be granted to those only whose conduct has been such that relief would not injuriously affect rights of innocent third parties. These rules applied to proceeding to reform a crop contract and deed of two quarter sections, where plaintiff claimed that the deeds should have conveyed one quarter to him and one to his father instead of both to them as tenants in common.

—Fritz v. Fritz, 264.

REGISTRATION OF TITLE.

The purpose of Laws 1901, p. 348, c. 237, is to provide summary method of determining interests in real property, to authorize the court to hear all controversies respecting the title, and by proper decree establish the title and rights of all interested parties. In such proceedings the court can determine the validity of a mechanic's lien, but cannot order its foreclosure.

—Reed v. Siddall, 216.

RIPARIAN RIGHTS.

Where plaintiff obtained government patent to meandered lots on shore of navigable lake, he is entitled to maintain ejectment against subsequent patentee of island between plaintiff's lots and center of lake which has become connected with the shore by sand bar. The riparian rights of plaintiff vested in him a contingent interest in all accretions by change of water line.

—Webber v. Axtell, 375.

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RULE OF COURT.

Rule 47 of district court rules relating to time of settling "case" or bill of exceptions.
—State ex rel. v. Kelly, 407.

SALE.

Instrument conveying the surplus rents and profits of certain real property, subject to rights of prior mortgagee in possession as trustee and collecting the rents, in consideration of a loan of money, construed to be a bill of sale or assignment of the rents, and not a mortgage of surplus rents and profits accumulating in hands of trustee.
—Seymour v. Ryan, 20.

An unpaid seller of goods has a lien on them while they are in his possession, but his lien is diverted by a delivery, unless there is a contract to the contrary.
—Meyers v. McAllister, 510.

SET OFF AND COUNTERCLAIM.

Question whether deposit to credit of one person may be set off by bank as part payment of debt due jointly from that person and another rendered immaterial because facts alleged in answer are admitted by demurrer to answer.
—Habegger v. First National Bank of St. Paul, 445.

SEWER.

Where plaintiff built a sewer at public expense and its city council adopted a resolution that any person might connect his premises adjoining the sewer by payment of specified sum, the defendant was liable to the payment, although his premises were directly connected with a sewer in another street which he had built to a connection with the former sewer.
—City of Fergus Falls v. Edison, 121.

SHERIFF.

Sheriff is not entitled to fee of one dollar from his county for each execution issued upon a personal property tax judgment which he returns unsatisfied. G. S. 1894, §§ 1570, 1574, and not sections 5550, 5553, govern.
—Justus v. Board of County Commissioners of Ramsey County, 72.

STATUTE.

Const. (U. S.) Amend. 14—Privileges of citizens.
—State v. Edwards, 231.

R. S. (U. S.) 1878 §§ 2304, 2306—Soldiers' and sailors' homestead.
—Gilbert v. McDonald, 291.

R. S. (U. S.) 1878 § 2448—Issue of patent to person who has died
—Gilbert v. McDonald, 290.

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STATUTE—Continued.
11 St. 195, c. 99—Grant of land to Minnesota.
—Olson v. Burk, 457.
30 St. 544, 547, 550 (§§ 1, 4, 5, 14, 15, 16, 17)—Bankruptcy act of 1898.
—Loomis v. Wallblom, 394, 395.
30 St. 545, 550, 557, 559, 565 (§§ 2, 15, 44, 55, 70)—Bankruptcy act of 1898.
—Rand v. Sage, 348, 350.
30 St. 562 (§ 60a)—Bankruptcy act of 1898.
—Habegger v. First National Bank of St. Paul, 447.
30 St. 565 (§ 67, subd. f)—Bankruptcy act of 1898.
—Cavanaugh v. Fenley, 507.
Const. (Minn.) art. 1, §§ 2, 7—Bill of rights.
—State v. Edwards, 231.
Const. (Minn.) art. 1, §§ 7, 10—Bill of rights.
—State v. Strait, 387.
R. S. 1851, p. 335, c. 70, § 51—Order directing publication of summons.
—Sodini v. Sodini, 304.
G. S. 1866, c. 11, § 154—Limitation of action to test tax lien.
—Otis v. City of St. Paul, 57, 61.
G. S. 1894, § 708—County auditor to give bond.
—Board of County Commissioners of Ramsey County v. Sullivan, 203.
G. S. 1894, § 715—Appointment of deputy county auditors.
—Board of County Commissioners of Ramsy County v. Sullivan, 203. 204.
G. S. 1894, §§728, 729, 730, 733—Deposit of county funds.
—Board of County Commissioners of Ramsey County v. Elmund, 200.
G. S. 1894, § 1224, subd. 10—Village fire department.
—Du Toit v. Village of Belview, 129.
G. S. 1894, §§ 1554, 1555, 1556—State board of equalization.
—Corbet v. Town of Rocksbury, 400.
G. S. 1894, §§ 1570, 1574—Fees in enforcement of personal taxes.
—Justus v. Board of County Commissioners of Ramsey County, 73.
G. S. 1894, § 1593—Tax certificate of sale.
—Otis v. City of St. Paul, 61.
G. S. 1894, § 1599—Purchaser at tax sale.
—Ross v. Cale, 517.
G. S. 1894, § 1605—Redemption from tax sale.
—Board of County Commissioners of Ramsey County v. Sullivan, 203.
G. S. 1894, § 1610—Same.
—Board of County Commissioners of Ramsey County v. Sullivan, 203.
G. S. 1894, § 1697—Refunding amount paid for tax certificate.
—Board of County Commissioners of Ramsey County v. Sullivan, 203.
G. S. 1894, c. 17, §§ 2039-2053—Bastards.
—State ex rel. v. Hausewedell, 179, 180.

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G. S. 1894, § 2053—Same, compromise.
—State ex rel. v. Hausewedell, 177, 178, 179.
G. S. 1894, § 4215—Statute of frauds.
—Olson v. Burk, 460.
G. S. 1894, §§ 4796, 4797—Divorce, service of summons.
—Sodini v. Sodini, 304.
G. S. 1894, § 4991—Trial of title to real estate in justice court.
—Sorenson v. Torvestad, 410, 411.
G. S. 1894, § 5068—Appeal from justice court.
—Buie v. Great Northern Railway Co., 406.
G. S. 1894, § 5134—Limitation of actions to recover real property.
—Otis v. City of St. Paul, 61.
G. S. 1894, § 5177—Action against defendants under firm name.
—St. Paul Typothetae v. St. Paul Bookbinders' Union, 351, 358.
G. S. 1894, §§ 5183, 5185—Place of trial of actions.
—State ex rel. v. District Court of Pine County, 373, 374.
G. S. 1894, § 5188—Change of venue.
—State ex rel. v. District Court of Pine County, 374.
G. S. 1894, § 5235—Objection to complaint waived.
—Pope v. Waugh, 502, 503.
G. S. 1894, § 5361—Trial of issues of fact by court.
—Hunt v. Ahnemann, 69.
G. S. 1894, § 5400—Bill of exceptions.
—State ex rel. v. Kelly, 408, 409.
G. S. 1894, § 5425—Lien of judgment.
—Reed v. Siddall, 218
G. S. 1894, § 5550—Fees of sheriff.
—Justus v. Board of County Commissioners of Ramsey County, 72, 74.
G. S. 1894, § 5553—Fees of sheriff.
—Justus v. Board of County Commissioners of Ramsey County, 72.
G. S. 1894, § 5659—Cross-examination of adverse party.
—I. L. Corse & Co. v. Minnesota Grain Co., 338.
G. S. 1894, § 5662—Privileged communications.
—McKenzie v. Banks, 499.
G. S. 1894, § 5754—Land-office receipt evidence of title.
—Gilbert v. McDonald, 290.
G. S. 1894, § 5864—Passing title to land by judgment of district court.
—Minnesota Debenture Co. v. Johnson, 154.
G. S. 1894, § 5917—Action by foreign executor.
—Pope v. Waugh, 503.
G. S. 1894, § 6557—Fornication.
—State v. Williams, 319.
G. S. 1894, § 7181—Excusing juryman from service.
—State v. Strait, 390.

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G. S. 1894, § 7190—Challenge to juror.
—State v. Strait, 391.
G. S. 1894, § 7987—Legal holidays.
—Fureseth v. Great Northern Railway Co., 502.
Laws 1889, p. 410, c. 253, § 10—Inspection of steam boilers.
—State ex rel. v. Justus, 208.
Laws 1895, p. 16, c. 8—Incorporation of cities.
—Kane v. Arneson Mercantile Co., 451, 452, 453, 454, 455.
Laws 1895, p. 147, c. 28—Change of venue.
—State ex rel. v. District Court of Pine County, 370.
Laws 1895, p. 386, c. 171—Employment of children.
—Tozer v. Ocean Accident & Guarantee Corporation, 481.
Laws 1895, p. 392, c. 175, § 25—Insurance agent.
—Webster v. Ferguson, 90, 95.
Laws 1895, p. 417, c. 175, § 53—Form of insurance policy.
—Fegelson v. Niagara Fire Insurance Co., 487.
Laws 1895, p. 437, c. 175, § 87—Insurance agent.
—Webster v. Ferguson, 86, 91.
Laws 1895, p. 504, c. 219—Receiving deposit in insolvent bank.
—State v. Strait, 387.
Laws 1895, p. 638, c. 257—Purchase of fire apparatus.
—Du Toit v. Village of Belview, 128, 129.
Laws 1895, p. 729, c. 320—Judgment notwithstanding verdict.
—Fischer v. Sperl, 428.
Laws 1897, p. 568, c. 307, § 3—Action on bond of contractor for public work.
—Grant v. Berrisford, 46, 47.
Laws 1899, p. 68, c. 69—Foreign corporations.
—Mason v. Edward Thompson Co., 472, 477.
Laws 1899, p. 92, c. 91—Inspection of steam boilers.
—State ex rel. v. Justus, 207.
Laws 1899, p. 174, c. 168—Village plat.
—Nagel v. Dean, 25, 26.
Laws 1899, p. 246, c. 225, does not violate Amend. 14, Const. (U. S.) nor Const. art. 1, §§ 2, 7, and is not an interference with interstate commerce.
—State v. Edwards, 225.
Laws 1901, p. 215, c. 167—Village sidewalks and sewers.
—State v. Foster, 412, 413.
Laws 1901, p. 348, c. 237—Registration of title to land.
—Reed v. Siddall, 216, 217, 219, 220, 221.
Laws 1901, p. 535, c. 321—Bonds of contractors for public work.
—Merchants National Bank of St. Paul v. City of East Grand Forks, 251.
Laws 1902, p. 38, c. 2, § 74—Invalidity of real estate tax.
—State v. Union Tank Line Co., 324.

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Laws 1903, p. 54, c. 46—Terms of Court in Benton County.
—Marr v. Sherry, 131.
Laws 1903, p. 186, c. 131—Inspection of steam boilers.
—State ex rel. v. Justus, 208.
Laws 1903, p. 627, c. 345—Change of venue.
—State ex rel. v. District Court of Pine County, 370.
Laws 1903, p. 690, c. 382—Assessments for public improvements in certain cities.
—Merchants National Bank of St. Paul v. City of East Grand Forks, 246, 248, 249.
Sp. Laws 1875, p. 95, c. 17—City of Northfield.
—State ex rel. v. Common Council of City of Northfield, 82.
Sp. Laws 1883, p. 277, c. 135—Township drainage act.
—Corbet v. Town of Rocksbury, 398.
Sp. Laws 1887, p. 602, c. 45—City of East Grand Forks.
—Kane v. Arneson Mercantile Co., 451, 452, 453.
Ohio—Laws 1888, p. 273—Mutual Fire Insurance Company.
—Swing v. Humbird, 3.
Action under Wisconsin statute concerning liability of railroad for injury to its servant occasioned by the negligence of fellow servant.
—Pope v. Great Northern Railway Co., 429.

STATUTE OF FRAUDS.
See Frauds (Statute of).

STEAM ENGINEER.
Laws 1899, p. 92, c. 91, providing for licensing of persons operating steam boilers and steam machinery of any kind, do not have reference to ordinary steam-heating plants used for heating buildings occupied in part for business and in part for residence.
—State ex rel. v. Justus, 207.

STIPULATION.
Where statute or rule of court fixes time for proposing bill of exceptions or case, the parties by stipulation may waive the benefit of the statute and the terms of the stipulation will govern.
—State ex rel. v. Kelly, 407.
Where attorney of record enters into stipulation settling and dismissing action, under mistaken assumption that he has express authority of his client to do so, his client is not bound thereby, may repudiate the stipulation within a reasonable time and reinstate the cause.
—Schaefer v. Schoenborn, 490.

STREET RAILWAY.
Where the defense in an action for injury caused by suddenly starting street

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STREET RAILWAY—Continued.

car while plaintiff was alighting was that she stepped off the car before it stopped, and was thus guilty of contributory negligence, it was not error to instruct jury that if plaintiff did get off the moving car, it was a question of fact for the jury whether person of ordinary care would have stepped off under same circumstances. Proper to refuse request to instruct jury that plaintiff could not recover if she stepped off, because request was indefinite as to speed of car.

—Cody v. Duluth Street Railway Co., 74.

Boy four years and a half old and sister eleven years old in charge of him are not guilty of contributory negligence, because in crossing street in front of car boy runs ahead and sister pursues to catch hold of him. Parents were not guilty of negligence in entrusting boy to care of older sister. Whether driver was guilty of negligence in not attempting to slacken speed of electric car until within twelve feet of child was question for the jury. Wanton negligence of motoneer not in issue. Verdict of two thousand dollars for injury to boy not excessive.

—Cameron v. Duluth Superior Traction Co., 104.

Court rightly granted a new trial for inadequacy of damages in action to recover damages for death of plaintiff's intestate, caused by wilful negligence of defendant, where verdict for plaintiff was one dollar.

—Rawitzer v. St. Paul City Railway Co., 494.

SUMMONS.

Upon collateral attack on default judgment return of service of summons and complaint will be construed sufficient if language can be thus construed fairly. Rule applied in case where action in divorce was against Robert J. Nelson and return showed service on John S. Bradley, who sometimes passed as Robert J. Nelson, that sheriff personally knew the defendant and knew him to be the person named as defendant; that his true name was not Robert J. Nelson but John S. Bradley, and that the name of Robert J. Nelson was an alias.

—Sodini v. Sodini, 301.

TAXATION.

Voluntary payment of taxes for number of years on vacant land by a stranger to the title, under mistaken belief he held a tax deed to the land, creates no obligation on part of the owner of the land to repay. Prepayment of taxes cannot be made a condition precedent to decree of title in record owner, based on unassailed findings that no tax deed or certificate had ever been issued to the person so paying.

—Bryant v. Nelson-Frey Co., 305.

Railroad tank cars belonging to nonresident corporation which has had no agent, office or place of business in Minnesota, used as instruments of interstate commerce, and not detained longer than was necessary for unloading them, are not subject to payment of taxes.

—State v. Union Tank Line Co., 320.

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TAXATION—Continued.

Statutory provisions concerning the various official acts which produce a tax to be collected, are in general directory, not mandatory. In action to recover amount of certain interest coupons, the assessment roll of defendant town was properly received in evidence to show its assessed valuation, although the name of the town was incorrectly stated or misstated, there were interlineations to make it conform to action of boards of equalization, the jurat signed by the assessor was not signed or sealed by the county auditor—when the lands within its limits are correctly described by government subdivisions so as to render its territory susceptible of easy ascertainment.

—Corbet v. Town of Rocksbury, 397.

Grantee of mortgagor who has covenanted to pay taxes may buy tax titles to mortgaged premises as against mortgagee after latter has sold and assigned the mortgage.

—Ross v. Cale, 513.

TENDER.

In an action at law for recovery of consideration paid for assignment of an account, tender of the return of all accounts and all collateral securities necessarily included an offer to do everything necessary to revest them in defendant, if offer was accepted. Demand of interest did not vitiate the tender.

—I. L. Corse & Co. v. Minnesota Grain Co., 331.

TRADE UNION.

An unincorporated voluntary association of employers of labor, without capital stock, for purpose of protecting the persons composing it in controversies with their workpeople has no legal capacity to sue in the association name. Similarly an unincorporated association of workmen organized for their own protection cannot be sued in the association name.

—St. Paul Typothetae v. St. Paul Bookbinders' Union, 351.

TRESPASS.

In action of trespass for destruction of fence claimed to be upon boundary line between land of plaintiff and defendant, the findings are sustained by the evidence.

—Kelly v. Daley, 253.

Where the assignee of a soldier's additional homestead certificate quitclaims his equitable interest in the specific land upon which he has filed his certificate, and a government patent is subsequently issued to his grantee, the latter may maintain action for damages for trespass upon the land committed between the date of the application and the date of the patent.

—Gilbert v. McDonald, 289.

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TRIAL.

In charging jury trial court rightly refused to give instruction emphasizing certain conceded facts on which plaintiff relied to overcome assertions of defendant concerning terms of contract of employment.
—Atwood Lumber Co. v. Watkins, 464.

Conduct of counsel in referring to result of first trial on second trial of action was censurable, but under instructions of court not prejudicial.
—McKenzie v. Banks, 496.

TROVER AND CONVERSION.

In an action for conversion of carload of grain received by defendant which was shipped in name of plaintiff, where the issue was whether the grain was so shipped to keep the grain from the creditors of the warehouseman, an instruction to the jury that it was immaterial whether a certain officer of the local bank or some other person actually obtained the signature to the bill of lading, was not error when given in connection with other language of court.
—Holden v. Maxfield, 27.

In action for conversion of certain shares of its capital stock by defendant the complaint stated a cause of action, although it failed to allege the value of the stock in addition to the damages sustained by plaintiff. The refusal of defendant to transfer the stock on its books and its assertion of the right to cancel the stock was a conversion of it.
—Humphreys v. Minnesota Clay Co., 469.

TRUST.

Neither an administrator nor his attorney can purchase an outstanding life estate in property belonging to his trust. If he does the administrator must account to the estate.
—Turner v. Fryberger, 433.

ULTRA VIRES.

Contract by village for purchase of fire apparatus, entered into under authority of statute, is not ultra vires because village was part of same election and assessment district as neighboring town.
—Du Toit v. Village of Belview, 128.

VENDOR AND PURCHASER.

Where defendant gave plaintiffs contract for sale of land and they in part payment turned over to defendant a stock of merchandise, the plaintiffs are entitled to recover the value of the merchandise where it appeared defendant never had any interest or title to the land and plaintiffs were always ready and willing to perform.
—Proctor v. C. E. Stevens Land Co., 181.

To constitute a contract for sale of real estate valid within statute of frauds a written offer to buy or sell must be accepted in writing, but the

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VENDOR AND PURCHASER—Continued.

offer and acceptance need not be in same writing. An application for purchase of railway land signed by applicant which has the printed signature of the railroad's land commissioner printed at the end of printed instructions and conditions does not constitute a contract. Nor do letters acknowledging payment signed by the land agent of the company when the approval of the land commissioner was requisite.

—Ferguson v. Trovaten, 209.

An action to cancel a contract for the sale of land on the ground of fraud, and for the recovery of the purchase price paid by the vendee before the discovery of the fraud, in which it does not appear that the vendors had title to the land, and in which no relief as to any real-estate record is involved, is a transitory, not a local, action.

—State ex rel. v. District Court of Pine County, 370.

Vendee in possession under contract for sale of real estate who has paid part of purchase price is equitable owner of land. His interest in it may be conveyed, may descend to his heir, and if not his homestead is subject to lien of judgment. Such vendee who has been induced to enter into contract by fraudulent representations of vendor as to quantity of land, on discovering the fraud may elect to keep his purchase and sue for damages sustained, even when not entitled to a deed and before full payment of purchase price. False representations as to quantity of land are not mere matters of opinion, but are material. Failure of vendee to ascertain their falsity by survey or reference to official records does not release vendor.

—Stearns v. Kennedy, 439.

VENUE.

An action to cancel a contract for the sale of land on the ground of fraud, and for the recovery of the purchase price paid by the vendee before the discovery of the fraud, in which it does not appear that the vendors had title to the land, and in which no relief as to any real-estate record is involved, is a transitory, not a local, action.

—State ex rel. v. District Court of Pine County, 370.

VILLAGE.

The free use of village hall for conduct of private business of member of village council and of the services of the village marshal in such business may be restrained by injunction at suit of person injuriously affected.

—Nerlien v. Village of Brooten, 361.

Villages organized under the general law have no power to construct or contract for construction of sewers until the property owners have an opportunity to perform the work under Laws 1901, p. 215, c. 167.

—State v. Foster, 412.

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WAREHOUSEMAN.

Where goods are left in storage warehouse agreed upon, are removed therefrom to another place by bailee without notice to bailor, and the goods are there destroyed by fire, the bailee is liable to the bailor for their market value. Intention of parties to store goods in certain place, a contract with reference to storage there, and delivery of the goods there to the bailee, is an agreement to store at that place. A conventional warehouse receipt which omitted to specify the place of storage was not the contract but the prior oral contract.

—McCurdy v. Wallblom Furniture & Carpet Co., 326.

WATER AND WATER COURSES.

Surface water is a common enemy which an upper proprietor may convey from his land to that of a lower proprietor, provided he does not cause unnecessary or unreasonable damage.

—Werner v. Popp, 118.

Where plaintiff obtained government patent to meandered lots on shore of navigable lake, he is entitled to maintain ejectment against subsequent patentee of island between plaintiff's lots and center of lake which has become connected with the shore by sand bar. The riparian rights of plaintiff vested in him a contingent interest in all accretions by change of water line.

—Webber v. Axtell, 375.

WILL.

Courts of equity set aside gifts to donee who stands in confidential or fiduciary relation to donor, whether gift be made inter vivos or by will. The question of undue influence is one of fact for jury. Except in clear case court is not justified in directing judgment notwithstanding verdict that will in favor of testator's child was obtained by undue influence. Where suspicious circumstances make case doubtful a new trial should be granted. That remedy has not been changed by Laws 1895, p. 729, c. 320.

—Fischer v. Sperl, 421.

WITNESS.

How far a witness may be cross-examined as to matters irrelevant to the issue, for the purpose of affecting his credibility, rests largely with the discretion of the trial court. Improper to attempt to discredit a witness by innuendo instead of competent evidence.

—Malone v. Stephenson, 222.

In an action against a corporation one of its stockholders who was an answering defendant was properly called as adverse party for cross-examination under G. S. 1894, § 5659. Immaterial that a verdict, with consent of plaintiff, was directed for all defendants except the corporation.

—L. L. Corse & Co. v. Minnesota Grain Co., 331.

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WITNESS—Continued.

Professional communications are not privileged if made in furtherance of a criminal purpose, but the court did not abuse its discretion in refusing to receive in evidence testimony that plaintiff had asked the witness (a physician) to produce a miscarriage upon her, the issue being whether defendant pushed plaintiff against a box.

—McKenzie v. Banks, 496.

Competency of witness to give expert evidence is preliminary question for trial judge, whose decision will not be reversed on appeal where there is evidence fairly tending to show competency or where witness is held to be incompetent.

—Meyers v. McAllister, 510.

WORDS AND PHRASES.

"Cohabit" in G. S. 1894, § 6557, means to live and dwell together.

—State v. Williams, 319.

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